

Supreme Court, U. S.  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

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No. **77 - 122**

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ROYAL W. SIMS AND THE R. W. SIMS TRUST,  
*Petitioners,*

v.

WESTERN STEEL COMPANY,  
*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI  
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FOR THE TENTH CIRCUIT**  
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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on March 25, 1977, in Appeal Nos. 75-1849 and 76-1703, entitled *Royal W. Sims and the R. W. Sims Trust v. Western Steel Company*.

**OPINIONS BELOW**

The unreported opinion of the court of appeals is reprinted in Appendix A. The opinions, orders and findings of fact of the United States District Court for the District of Utah are reprinted in Appendix B.



An unreported partial summary judgment was ordered by the district court and was entered December 20, 1974. The district court entered an opinion on September 23, 1975 which is reported at 403 F. Supp. 450 (D. Utah 1975), and the district court's unreported findings of fact were entered May 8, 1976.

#### JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit (Appendix A) was entered on March 25, 1977. A timely motion for extension of time to file this petition was granted by Mr. Justice White on June 11, 1977, the time being thereby extended until July 21, 1977 (Appendix C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

#### QUESTIONS PRESENTED

An important question of judicial administration is presented in this case. A serious problem exists in the federal courts in Utah. Judge Willis W. Ritter, Chief Judge of the U.S. District Court, District of Utah and various judges of the Tenth Circuit Court of Appeals have become embroiled in a bitter personal controversy that adversely affects the rights of litigants in those federal courts. The petitioners here are among the unintended victims of that skirmish. As stated in Judge Ritter's attached affidavit, the judicial process in the Tenth Circuit is "eroding badly" (Appendix D, at 1a). The situation "seriously threatens the ability of parties who have tried cases in [Judge Ritter's] court to receive fair and impartial justice on appeal." *Id.*

The present case presents the following questions:

1. Can personal animosity on the part of judges of a circuit court of appeals towards a district judge, combined with an apparent effort on the part of the circuit court to discipline the district judge by summarily reversing his opinions, create the appearance and fact of bias on the part of the circuit court with respect to appellees from the district court's judgments? If so, does this appearance of prejudice violate the right to due process of appellees from judgments by the district court? Does it abrogate the high standards of fair and impartial justice that this Court, as supervisor of the federal judiciary, has established for the federal judicial system?

2. What procedures should a circuit court of appeals follow in disposing of individual cases appealed from a "problem" district court, without transgressing the rights of an appellee from that court?

3. Can an appellate court, despite the unambiguous meaning of Rule 8(c), Fed. R. Civ. P., consider the affirmative defense of release as well as the evidence purporting to constitute such release when the defense had not been pleaded, and when the release document had never been admitted into evidence?

4. Can a court, on appeal, ignore the findings of fact made by the district court judge and circumvent the mandate of Rule 52, Fed. R. Civ. P., by substituting its own findings of fact and rulings by reliance upon evidence not a part of the record on appeal?

### STATUTORY PROVISIONS INVOLVED

In pertinent part, the following statutes are involved in this petition:

#### 28 U.S.C. § 291(a):

The Chief Justice of the United States may designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit where the need arises.

#### 28 U.S.C. § 455:

##### Interest of justice or judge

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

#### 28 U.S.C. § 144:

##### Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

#### Rule 8(c), Fed. R. Civ. P.:

**Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirma-

tively . . . release, . . . waiver, and any other matter constituting an avoidance or affirmative defense.

#### Rule 52(a), Fed. R. Civ. P.:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgement shall be entered pursuant to Rule 58; . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

### STATEMENT OF THE CASE

#### Introduction

This is a patent infringement case. As such it would not ordinarily warrant the attention of this Court. But this is a case with a difference. The present litigation is an example of a festering sore on the body of the federal judiciary. It is a sore that discreet handling has kept from the scrutiny of this Court. The present petition urges the Court to take a look; to exercise its responsibility for supervising the lower federal courts by reviewing this case and providing guidance to the lower courts on how to deal with deplorable personal conflicts between judges at different levels of the judicial system which can adversely affect the rights of litigants.

Petitioners have interests in a patent that was the basis for their recovery of a substantial judgment rendered by the Chief Judge of the District Court for the District of Utah. Their recovery was literally snatched from the jaws of victory by a court of appeals bent



upon the systematic reversal of the judgments of the district court in which petitioners prevailed. After litigation which commenced with a suit against Western Steel in 1967, and which involved issues which have been litigated, settled and re-litigated over a period of 10 years, petitioners were the beneficiaries of a judgment based on 83 detailed findings of fact and conclusions of law to the effect that the defendant/respondent wilfully induced infringement of their patent and failed to abide by a contract concerning related proprietary data. Without citation of authority or indication of how the district court's findings and conclusions were "clearly erroneous" (as required under Rule 52), the decision below was reversed. Petitioners contend the judgment was reversed not because of the legal principles involved; those were relegated to a secondary role. It was reversed because the U.S. Court of Appeals for the Tenth Circuit has determined to try to remove or otherwise discipline the Chief Judge of the U.S. District Court for the District of Utah through clockwork reversals of his decisions. Every civil appeal taken from his court in 1975 was reversed; his reversal rate in all cases was three to four times the national average, or the average of cases from the other lower courts in the Tenth Circuit. As the affidavit of the district judge—willingly offered to petitioners in this case—movingly attests, appellees from his court cannot obtain justice from the court of appeals. That makes this case a very different patent infringement suit.

#### **The Technical Facts**

Petitioner Royal W. Sims is an inventor and a manufacturer of cement mixers, and is Trustee of the peti-

tioner R. W. Sims Trust, which holds U.S. Patent No. 2,859,949 ("Sims Patent") covering a type of concrete mixer truck. Respondent Western Steel Company is a United States manufacturer of concrete mixer trucks. Respondent obtained a license under the Sims Patent pursuant to an agreement, dated December 14, 1968, which provided in part that all engineering drawings, plans, designs and specifications covering the concrete mixer trucks developed under the concept of the Sims Patent would "be returned" to Sims upon the termination of the license. In 1971, the license was terminated and respondent sold the engineering drawings, plans, designs and specifications then in its possession to Rite-Way, Inc., of Indiana, a competitor of petitioners, and failed to return them to petitioners as required under the terms of the licensing agreement. Since acquiring this material, Rite-Way has infringed the Sims Patent and, as a direct result, has acquired a substantial and profitable business in making, selling and using concrete mixers and replacement parts.

In separate, unrelated litigations, petitioners sued Rite-Way in 1973 and respondent (for the second time) in 1974, in the United States District Court for the District of Utah, Chief Judge Willis Ritter presiding, seeking damages for respondent's breach of the licensing agreement and its active inducement of Rite-Way to infringe the Sims Patent. Petitioners also sought damages from Rite-Way directly for Rite-Way's infringement of the Sims Patent.

In 1974, petitioners settled with Rite-Way by entering into a licensing agreement giving Rite-Way the right to manufacture concrete mixer trucks under the Sims Patent ("Rite-Way Licensing Agreement"). As part of the settlement, petitioner Sims executed a re-



lease releasing Rite-Way from liability with respect to infringement of the Sims Patent prior to the date of the Rite-Way Licensing Agreement.

The Sims-Western dispute was not settled and gave rise to the present action. The district court granted partial summary judgment on December 20, 1974, determining that respondent was liable to petitioners for breach of the 1968 licensing agreement. In an opinion entered September 23, 1975, the district court reaffirmed this judgment and awarded damages. The court also concluded that respondent's action was "wilful and malicious." 403 F. Supp. at 455. In its opinion of May 8, 1976, the district court also determined that respondent was guilty of inducement to infringe a patent under 28 U.S.C. § 1338(a) and 35 U.S.C. § 271 (b).

With scant citation of authority, the court of appeals reversed on both of petitioner's claims of breach of contract and inducement to infringe a patent. The court of appeals based its reversal on the breach of contract claim on its determination that the drawings Sims demanded were "produced" by Western and, although derived from notes, preliminary drawings and prototypes supplied by Sims, were not originated by, and thus subject to "return" to Sims. The court based its reversal on the claim of inducement to infringe on its conclusion that the release given Rite-Way by Sims in the Rite-Way Licensing Agreement of 1974 effectively released Western as well as Rite-Way. The 1974 release document upon which the court of appeals based its decision had neither been introduced into evidence nor affirmatively pleaded as a defense at trial as required pursuant to Rule 8(c), Fed. R. Civ. P.

None of the district court judge's 83 findings of fact and conclusions of law relating to liability and damages was found clearly erroneous by the court of appeals; they were simply ignored, contrary to Rule 52, Fed. R. Civ. P.

#### **The Tenth Circuit Circus**

The reversal of petitioners' judgment cannot be understood without a consideration of the unseemly manner in which the Chief Judge of the Tenth Circuit Court of Appeals, Judge David T. Lewis, and certain other Tenth Circuit Judges have exercised their authority to review the judgments of the district court over which Judge Ritter presides. In an effort to have Chief Judge Ritter removed as the chief judge of the district court, Judge Lewis has appeared before a Subcommittee of the Senate Judiciary Committee to testify in favor of a bill which would effect the removal. A transcript of the Subcommittee hearing is appended hereto as Appendix E. It presents as graphic a record as any available of the sorry state of affairs in the Tenth Circuit.

Granted, the picture of Chief Judge Ritter, as painted by the testimony of Judge Lewis, is an unattractive one. Judge Ritter is made to appear intractable, unjudicious, arbitrary and querulous. While the testimony offered by Judge Lewis is partially phrased in terms of the administrative qualities and abilities of Chief Judge Ritter, there are carefully woven into the testimony references to Judge Ritter's tenure as one of "constant turmoil." Judge Ritter is made to appear incapable of controlling the affairs of his court in a dignified and appropriate manner. Judge Ritter's decisions and acts are referred to as "intolerable." On



the other hand, Judge Lewis, through polished and restrained testimony, portrays himself as a patient, long-suffering chief judge, laboring under hardship and stress, bewildered, even baffled, by a "problem" district judge by whom he and his colleagues at the Tenth Judicial Council are sorely tried.

One episode well illustrates the point. In the words of the judge,

"We [the Judicial Council] think that we've done everything that we can, formally, informally, to dilute the turmoil that has existed in Utah for a long, long time. It surfaces on minor matters, where persuasion has been effective. But we are the only circuit court that I know where we have had any district judge openly defy council orders." *Chief Judge—Grandfather Clause: Hearings on S. 1130 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee, 94th Cong., 2nd Sess. 172 (1976) (hereafter "Hearings")*.

But an entirely different picture emerges from the testimony of Professor William J. Lockhart, a member of the faculty of the College of Law at the University of Utah, and former United States Attorney, who stated:

"[On] the basis of the information available to me, . . . Judge Lewis's comments about defiance of the 10th Circuit's orders were . . . overdrawn. My recollection of your hearing is that he implied there had been frequent or general defiance of Circuit orders, but that he cited only one example: a dispute arising from reallocation of pending cases at the same time the other judge on the Utah dis-

trict bench resigned to accept senior judge status and was replaced by Judge Anderson.

\* \* \*

"Far from evincing an attitude of defiance or disregard of legal authority and principle, that problem was handled wholly as a dispute of legal principle. The difficulty arose because the Circuit rule for allocation of the cases in the District of Utah simply had not provided for reallocation of cases upon the retirement of a sitting judge. . . . [It] was therefore necessary for Judge Ritter to exercise the residual powers of Chief Judge in that narrow situation to provide for proper assignment of those cases. It was made very clear to the Circuit that we regarded the issues presented as substantive questions of importance to the role and function of the federal judiciary; and indeed, it is still my belief that we advanced the more substantial side of the dispute. (Of course that is a difficult question to resolve because the Circuit's Opinion did not explain the basis for its disposition of a number of the legal issues presented.)

\* \* \*

"[At] the time the Circuit's order came down, the Judge had clearly indicated his intention to petition for Certiorari to review the decision and had received no response to his motion to stay the order. Subsequently, and pursuant to his intent legally to contest the validity of the Circuit's order, he held a hearing and made certain rulings in the disputed case. But thereafter, on the very same day, he adopted an earlier telephone suggestion from Mr. Justice White (10th Circuit Justice) by reconsidering his rulings and agreeing with Judges Lewis and Anderson that the dispute should be settled by reassignment of the disputed case to a judge from another district—a resolution which he promptly implemented with orders first staying his rulings, then rescinding them. Far from



reflecting the hardened defiance suggested by Judge Lewis, then, Judge Ritter's approach to this matter involved appropriate and substantial legal steps to contest the matters on the merits and complete disavowal of any action that could have been construed as defiant." *Hearings* at 227-228.

However, it is Judge Lewis who sits on the court of appeals. And his antagonism has also been manifested by Judges Breitenstein and McWilliams, thus affecting one third of the active or active and senior judges on the Tenth Circuit, at least one of whom is virtually bound to be a member of any panel hearing cases appealed from Judge Ritter's court. (Judge McWilliams was on the panel in this case.) The affidavit of Judge Ritter (Appendix D) is informative in this regard.

As Judge Ritter notes, his decisions are being reversed on appeal an inordinate percentage of the time. In 1975, ten of Judge Ritter's decisions in civil cases were appealed to the Tenth Circuit; all ten were reversed in whole or in part. Of 312 cases decided by Judge Ritter between 1949 and 1975, fifty-eight percent of the civil cases which were appealed were reversed, as well as forty percent of the criminal cases and an incredible seventy-six percent of the *habeas corpus* cases. *Hearings* at 17.

By contrast, in the year ending June 30, 1976, 17.9% of all cases disposed of by all of the U.S. Circuit Courts of Appeals were reversed and 17.6% of all cases disposed of by the Tenth Circuit Court of Appeals were reversed.<sup>1</sup>

<sup>1</sup> *Annual Report of the Director of the Administrative Office of the U.S. Courts 1976*, 276-277. (Hereinafter, the "Annual Reports".)

During the past ten years, the highest average rate of reversal for all circuits was 21.6% in 1968, and the highest average rate of reversal for the Tenth Circuit was 20.9% in 1966.<sup>2</sup> The rate of reversal of Judge Ritter's opinions is far above both the national average and the average for the Tenth Circuit.

If the Court grants this petition, petitioners have been advised that the Administrative Office of the U.S. Courts will be in a position to obtain substantially more detailed statistics concerning the performance of the U.S. District Court of Utah, at least for the past five years. They should verify the impressions already clearly attainable from the information available now.

It is interesting to note that while Judge Ritter sat by designation within the Ninth Circuit for six years, no remotely comparable reversal rate existed. Further, his rate of reversal increased dramatically only in 1970, when Judge David T. Lewis was appointed Chief Judge of the Tenth Circuit. In fact, from 1970 to 1975, Judge Ritter was sustained in only 34 decisions, and reversed in 71 decisions by the Tenth Circuit for an incredible 67% reversal rate. Prior to 1970, Judge Ritter's reversal rate was 45%.<sup>3</sup>

<sup>2</sup> *Annual Reports*, *supra* for years 1966-1976, inclusive. See Appendix F.

<sup>3</sup> According to statistics gathered by George Speciale, Esquire, of Salt Lake City, Utah, from his examinations of records maintained by the Salt Lake City Office of the Attorney General, State of Utah, Judge Ritter had 186 cases appealed to the Tenth Circuit Court of Appeals between 1949 and 1969, of which 85 were reversed by the circuit court on appeal for a 45% reversal rate. Between 1970, when Judge Lewis was appointed Chief Judge of the Tenth Circuit Court of Appeals, and 1975, 105 cases were appealed from Judge Ritter's court and Judge Ritter was reversed in 71 cases, for a 67% reversal rate.



By comparison, when this Court has had occasion to review cases arising from Judge Ritter's court, Judge Ritter has done fairly well. Of the six cases petitioners have identified as within this group, the Tenth Circuit had on each occasion reversed Judge Ritter's decision. However, four of the Tenth Circuit's judgments were again reversed by this Court, and Judge Ritter's decisions reinstated.<sup>4</sup> A fifth case was remanded to Judge Ritter's court. Only in the sixth was the Tenth Circuit's reversal of Judge Ritter sustained.<sup>5</sup>

#### REASONS FOR GRANTING THE WRIT

##### 1. THE SITUATION IN THE TENTH CIRCUIT CREATES THE APPEARANCE OF PREJUDICE WHICH VIOLATES THE PETITIONERS' RIGHT TO DUE PROCESS.

This Court, as well as lower courts, has remained acutely sensitive of the need to provide litigants in any United States federal tribunal with a fair, complete and impartial hearing before judges who are free of

<sup>4</sup> *Robertson v. U.S.*, 343 U.S. 711 (1951), *rev'g* 190 F.2d 680 (1951); *Gordon v. U.S.*, 347 U.S. 909 (1953), *vacating* 203 F.2d 248 (1953); *Hatahley v. U.S.*, 351 U.S. 173 (1955), *rev'g* 220 F.2d 666 (1955); *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), *aff'g* 349 F.2d 122 (1965); *Harless v. Turner*, 404 U.S. 932 (1971), *rev'g* apparently unreported opinion in the court below; *G.M. Leasing Co. v. U.S.*, 429 U.S. 338 (1977), *rev'g* 514 F.2d 935 (1975).

*U.S. v. El Paso Natural Gas*, 376 U.S. 651 (1964) is not included in the statistics, as that case was appealed directly to the Supreme Court from the district court. The Supreme Court reversed Judge Ritter in that case.

<sup>5</sup> Although not directly relevant to petitioners' own case, Judge Ritter's affidavit makes the added point that the unseemly reversals of his judgments tend to render the federal district court in Utah an object of ridicule and contempt, thus inhibiting potential litigants from exercising their right of access to that court.

prejudice and bias. See, e.g., *Commonwealth Coatings Corp. v. Continental Casualty*, 393 U.S. 145, 150 (1968); *In re Murchison*, 349 U.S. 133 (1954); *Amos Treat and Co. v. Securities and Exchange Commission*, 306 F.2d 260, 267 (D.C. Cir. 1962).

For example, in *In re Murchison*, the Court held violative of due process a procedure whereby a judge, acting pursuant to state law as a so-called one-man grand jury, charged witnesses for contempt and then, in his capacity as a trial judge, tried and convicted them of the contempt charge. The Court held that a trial by a judge who has an interest in the outcome is not a fair trial, noting:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" 349 U.S. at 136.

In this case, District Judge Ritter has stated in a sworn affidavit that an appellee from his court cannot get a fair hearing on appeal. He has found several judges of the circuit court so close-minded that they presume error and reverse, almost as a reflex, any judgment rendered. The panel in this case gave so little consideration to the transcript of the case that in its haste to reverse, it clearly erred as a matter of law in relying almost entirely on an unpleaded affirmative defense.

This case provides the Court with the previously unresolved issue of whether animosity—real or perceived—on the part of the circuit court judges towards a judge of a district court within that circuit violates the due process rights of a litigant to an unbiased hearing on appeal. If, as petitioners maintain, such animosity can create the appearance of bias, in violation of a litigant's right to due process, the party cannot protect his rights in any way except by appeal to this Court. No remedy is provided by statute, since the mandatory recusal statute, 28 U.S.C. § 144 (and its predecessor, 28 U.S.C. § 25), has been held inapplicable to judges of the United States Circuit Courts of Appeals. *Duke v. Committee on Grievances of the Supreme Court*, 82 F.2d 890 (D.C. Cir. 1936); *Millslagle v. Olson*, 128 F.2d 1015 (8th Cir. 1942).

28 U.S.C. § 455 is a recusal statute which does apply to all federal judges. But as elaborately described by Mr. Justice Renquist, it only makes recusal *voluntary*. *Laird v. Tatum*, 409 U.S. 824 (1972). Section 455 also fails to cover the circumstances of this case, since the situations in which a judge may recuse himself are spelled out in the statute and bias against the trial judge is not one of the situations specified. 28 U.S.C. § 455. Petitioners' only effective remedy for violation of their right to due process is to seek review by this Court.

**2. AS SUPERVISOR OF THE FEDERAL JUDICIARY, THE COURT SHOULD RESOLVE THE SITUATION IN THE TENTH CIRCUIT BY PROVIDING GUIDANCE FOR HANDLING "PROBLEM" JUDGES.**

An intolerable situation exists in the Tenth Circuit. Whether or not Judges Lewis, McWilliams and Breit-

enstein are in fact biased against Judge Ritter and are therefore inclined to reverse decisions from his court, the 67% average reversal rate of Judge Ritter's decisions since 1970, when Judge Lewis became chief judge of the circuit court, as well as the strong opinion of Judge Ritter that an appellee from his court cannot get a fair and impartial hearing on appeal, creates the appearance of bias. In the past, this Court has been quick to intervene in cases where there appeared to be bias in the judicial system. *In re Murchison*, 349 U.S. 133 (1954); *Offutt v. United States*, 348 U.S. 11 (1954); *McNabb v. United States*, 318 U.S. 332 (1942).

As the supervisor of the federal judiciary, the Court has a duty to intervene when the judicial machinery in a circuit has broken down. *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 225 (1946). The only appropriate vehicle by which the Court can exercise its supervisory power is a case or controversy. U.S. CONST., art. III, § 2.

Once this Court has granted this petition for certiorari, the Court has several options on how to proceed, in addition to the option of hearing this case. For example, the Court could appoint a special master to examine the situation in the Tenth Circuit and recommend a solution. Alternatively, the Court could reverse and remand for a hearing before a new panel appointed by the Chief Justice under 28 U.S.C. § 291(a) and composed of circuit judges from a circuit other than the Tenth Circuit.



**3. THE COURT SHOULD CONSTRUER THE RIGHT OF A COURT OF APPEALS TO CONSIDER THE AFFIRMATIVE DEFENSE OF RELEASE WHEN THE DEFENSE IS NOT PLEADED AT TRIAL.**

It is clear that an unpleaded affirmative defense is waived if not pleaded at trial in a timely manner. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). However, this Court has never addressed the somewhat narrower issue of whether a court of appeals may consider such an affirmative defense when raised by an appellee for the first time on appeal but not even pleaded at trial.

In this case, respondent attempted to introduce into evidence at trial a document purporting to release it from liability to petitioners. Introduction of the document was objected to during the first hearing (on the breach of contract issue) on the ground that the defense of release had not been affirmatively pleaded as required by Rule 8(c), Fed. R. Civ. P. Respondent was given the opportunity to amend its pleadings and failed to do so. Consequently, the trial court sustained petitioners' objection to the admission of the release document. More than a year later, at the hearing on petitioners' claims that respondent induced infringement of their patent, respondent moved to amend its pleading to include the defense of release. The court declined to grant respondent's then belated motion to amend its pleadings. Respondent nevertheless again attempted to introduce the release document into evidence. Petitioner again objected and was sustained on the ground that release had not been pleaded.

On appeal, the Tenth Circuit issued its opinion reversing the district court, basing its decision almost

entirely on the so-called release. Not only was this an improper disregard of the Federal Rules of Civil Procedure; much more vitally, it denied petitioners the opportunity to present the numerous defenses they believe they could properly invoke to demonstrate that the alleged release is neither in law nor fact what respondent contends. As they believed the issues relating to release were excluded from the case, they addressed them neither at trial nor on appeal. This unwarranted injection of what turned out to be a dispositive issue at the appeal level also violated petitioners' right to due process and constituted so egregious a departure from established procedures as to require the intervention of this Court.

**4. THE COURT SHOULD DETERMINE THE LIMITATIONS IMPOSED BY RULE 52 UPON THE REVIEW BY CIRCUIT COURTS OF APPEALS OF THE FINDINGS OF DISTRICT COURTS.**

While the findings of fact of a U.S. District Court shall be accorded great weight by a Court of Appeals (Rule 52, Fed. R. Civ. P.), it is accurately reported in the notes to the Rule in the U.S. Code Annotated that the Rule has never been given authoritative interpretation by the Supreme Court. In the present case, the trial court was incensed by what was perceived as a vengeful action by respondent in handing over to the plaintiffs' competitors a great body of technical information, virtually without cost and in apparent disregard of its contractual obligations to petitioners. The court of appeals, with no record citations, purported to review the same evidence but found nothing improper in respondent's actions. While obviously reasonable men may differ even on a record such as was made here, this Court has never instructed the courts



of appeals of the extent by which a district court's equitable findings must be accepted under Rule 52 unless demonstrably "clearly erroneous."

#### CONCLUSION

This is an unpleasant case for the Court. As stated at the outset, it brings before the Justices an unseemly sore in the system that only this Court can effectively remedy. The Court should grant the requested writ to bring the record before it and then consider appropriate corrective steps: review, referral to a master, or remand to an unbiased panel of judges from outside the circuit. To leave the status quo in the Tenth Circuit relegates appellees from the Utah District Court to a situation in which they are either without due process or without effective recourse to the federal judicial system.

Respectfully submitted,

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## APPENDIX

**APPENDIX A**

UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

Nos. 75-1849 and 76-1703

ROYAL W. SIMS and the R. W. SIMS TRUST,  
*Plaintiffs-Appellees,*

v.

WESTERN STEEL COMPANY, *Defendant-Appellant.*

Appeal from the United States District Court for the  
District of Utah, Central Division (D.C. No. C-74-  
131)

John A. Young, 127 West Berry Street, 709 Commerce  
Building, Fort Wayne, Indiana 46802 (Robert D. Maack  
of Watkiss & Campbell, 315 East Second Street South, Salt  
Lake City, Utah 84111, on the brief), for Plaintiffs-Appellees.

George M. McMillan of McMillan and Browning, 1020  
Kearns Building, Salt Lake City 84101 (Ted Boyer of  
McMillan and Browning, on the brief), for Defendant-Appellant.

Before McWILLIAMS, BARRETT and DOYLE, Circuit Judges.  
DOYLE, Circuit Judge.

Defendant-appellant seeks reversal of judgments entered by the United States District Court for the District of Utah on September 23, 1975, and on May 28, 1976. In the first of these partial summary judgment was entered growing out of the alleged breach of license agreement executed in 1968 by plaintiff-appellee, Sims, and defendant-appellant, Western Steel Company. The provision of the license agreement which the court held was violated and which was the basis for damages provided:



All engineering drawings, plans, designs and specifications concerning the forward discharge transit concrete mixers within the concept of patent rights of Licensor under this patent shall be, upon termination of the license as provided herein, *returned* to Licensor at the date of termination.

The court found that there was not only a failure to return some plans and drawings, but that defendant had also made these available to a patent infringer, Rite-Way, Inc. of Indiana. On this account judgment was entered against Western in the amount of \$191,426 for compensatory damages, \$150,000 for conversion of trade secrets, \$100,000 for punitive damages and costs and attorney's fees.\*

Western's evidence disputes that any Sims drawings were delivered to it. Thus, Western claims there were none to be returned. It claims to have developed its own drawing and design information in the course of manufacturing, assembling and fitting the component parts. Western's position is that the drawings which it made were plans translating the patent concept into a workable vehicle and that it committed no wrong in sending these to Rite-Way of Indiana.

The other case grew out of Western's alleged inducement of Rite-Way to infringe U.S. Patent No. 2,859,949

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\* The trial court found that Western had sold the shop drawings to Rite-Way for \$109.31. This was a faulty premise. The record shows that these drawings were not sold for \$109.31 or any other sum. Instead, Western charged Rite-Way \$109.31 for reproducing 231 of Western's drawings (\$.46 per print). Even, however, if there had been a sale it would be impossible to conceive of this giving rise to the imposition of a two million dollar plus judgment against Western, particularly since there is no showing that Rite-Way made any significant use of the drawings; that Sims suffered any loss as a result of the delivery; that these were in truth trade secrets; or that they had property value of any sort.

covering a concrete mixer truck (forward discharging vehicle), in which Sims and the Sims Trust claimed ownership. It was found and determined at trial that Western had induced the Rite-Way of Indiana infringement and that this grew out of the same delivery of drawings. The court further held that Western was responsible for all of the lost profits of Sims measured by the total reserved royalties of Rite-Way, Inc. of Indiana, which sum was \$491,000. The court went on to hold that on a finding of bad faith on the part of the party infringing (or inducing), the damages can be trebled. It proceeded to treble \$491,000. It awarded attorney's fees in addition.

Sims had demanded from Western \$491,000. This was the exact sum which represented the total royalty obligation of Rite-Way of Indiana. A large part of this was paid to Sims by Rite-Way as a result of a settlement agreement. The \$491,000 alleged loss of profits to Sims was attributable to failure of Rite-Way of Indiana to pay royalties over a long period of time. These were transactions with which Western had no connection whatsoever. Western at best was connected with but one transaction, the furnishing of some shop drawings to Rite-Way of Indiana.<sup>1</sup> On its face, then, the gross disproportionateness of the award is apparent.

The mentioned settlement concluded between Sims and Rite-Way of Indiana provided for Sims to receive \$360,000 in full settlement of all claims for royalties (which amounted to \$491,000) against Rite-Way of Indiana. All

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<sup>1</sup> The only sales of Rite-Way, Inc. which could possibly have been attributed to conduct of Western were those involving so-called three-axle vehicles. The maximum number of these manufactured by Rite-Way, Inc. after delivery of the drawings was twelve. The remaining vehicles for which Rite-Way owed royalties, four and five-axle vehicles, were manufactured before and after 1971. The maximum amount of royalties attributable to Western, if it were shown to have been responsible, would have been \$18,000 (\$1,500 per three-axle vehicle).



lawsuits between them were thereby settled and all differences were resolved. This was participated in by Moran Tank Company which was also responsible for the debts of Rite-Way, Inc. of Indiana. A judgment evidencing this settlement was entered on February 4, 1974, by the same district court in another action which was on file between Sims and Rite-Way of Indiana (and Moran).

One of the arguments advanced by Western is that this unconditional release of Rite-Way, Inc. of Indiana precludes *any* recovery against Western. The theory is that the release followed by a complete settlement evidenced by the entry of judgment for the full amount determined owing from Rite-Way, the direct infringer, operates in law to close the door to any supplemental recovery for the same acts from Western on the alleged theory of inducement of infringement.

It is important to identify Rite-Way, Inc. of Indiana and other participants. In these complex dealings Sims gave a license to Rite-Way, Inc. of Indiana commencing in 1967 to manufacture four and five-axle concrete mixer trucks. This arrangement continued to 1971. On February 28, 1972, but retroactively effective June 12, 1971, Sims entered into a written contract with Beta Corporation, which is not here joined, whereby the latter acquired from Sims all the rights to the patent. Beta had entered into a license agreement with Rite-Way, Inc. of Indiana, effective July 1, 1971, giving that corporation the limited right to manufacture three, four and five-axle models of the patented invention. This agreement also authorized Rite-Way of Indiana to manufacture replacement parts for forward discharge concrete mixer vehicles which had been previously manufactured and sold. By its terms it ended August 31, 1971, although Rite-Way of Indiana continued to manufacture vehicles and to maintain a royalty reserve.

Beginning in 1970, Rite-Way, Inc. of Indiana went through Chapter XI of the Bankruptcy Act. Later, Moran

Tank Company, Inc. took over Rite-Way, and from the accounts available, Moran also went into bankruptcy in 1974. During the period of the Moran custody a settlement between Rite-Way of Indiana (and Moran) and Sims occurred.

In the period following the 1968 agreement between Sims and Western, Western had a number of conferences with Rite-Way of Indiana dealing with a possible merger of the two companies. One such conference was in August 1969, at which time one Limbaugh, a purchasing agent of Rite-Way and later General Manager, visited the Western Steel Company facilities in Utah and took back with him customer lists and lists of assets of Western. A dispute exists as to whether Western furnished servicing and manufacturing information contained in two trial exhibits at this time. Western denies that it did so, and there is no evidence in the record that they gave anything except customer lists, vendor lists and some parts descriptions.

Two Rite-Way of Indiana employees, Bowen and Borden, testified during the trials. Bowen said that the drawings were invaluable to Rite-Way of Indiana and that the company profited by having them.<sup>2</sup> As to the customer and vendor lists that Judge Ritter referred to in his findings as being a source of damages, Bowen merely said that he assumed they were used because he saw Limbaugh's trip report referring to them in the company files. He also stated that Rite-Way of Indiana got in the three-axle mixer business after receiving the drawings in 1971. He, however, was not with Rite-Way at the time that the report was written in 1969, nor was he with them afterwards until 1972. Bowen died before the trial on the inducement of patent infringement issues. Borden, who was also general manager of Rite-Way of Indiana, testified at that trial. He

<sup>2</sup> This characterization was the only evidence that the drawings were of any value.

said that when he left Rite-Way in 1970, the company did not have the technical know-how provided by the detailed drawings. On specific questioning by Judge Ritter he said that he did not have personal knowledge about the circulation of the drawings around the manufacturing plant.

Western's division manager testified that the only reason he sent the drawings to Rite-Way of Indiana was because it (Western) was phasing out the manufacture of the vehicles and wished to have someone manufacture replacement parts for the 100 or more vehicles which it had manufactured and sold. Western also had offered testimony of an engineer, one Emke, saying that the detailed drawings could not have been used in the manufacture of the three-axle vehicles produced by Rite-Way of Indiana.

There exists a dispute about the failure of the trial court to receive the deposition of Limbaugh. In that deposition he stated that his company had not used the drawings obtained in 1971 for the purpose of manufacturing new trucks; that they had made their own drawings as they built trucks; and that they had built the initial three-axle trucks prior to receiving the drawings. He stated that some of the drawings were used in the manufacture of one replacement part, the chute. No justification for refusal to take this deposition is apparent since it was relevant and all formal requisites were satisfied.

Another disputed item of evidence is a statement given by Borden, which was attributable to Bowen who had since died, that Rite-Way had acquired all of Western Steel's technical knowhow relating to the manufacture of three-axle trucks. The court received this rank hearsay pursuant to Rule 804(b)(5), Fed. Rules of Evid.

# THE CONTENTIONS OF WESTERN IN CASE No. 75-1849, THE ACTION FOR BREACH OF THE LICENSE AGREEMENT

Western's contentions are that:

First, the court erred in not dismissing Sims' action because it is not a case arising under federal law; it is merely a suit for breach of contract. It was not appropriate for the court to entertain the action on a pendent jurisdiction basis because the patent action was palpably insufficient in law and fact, and even if there was some semblance of a claim, it would not satisfy the requirements of pendent jurisdiction.

Second, there is no substantial evidence of damages to support the court's conclusions. There is a lack of proof that the delivery of drawings to Rite-Way produced any damage to Sims caused by the alleged breach of license agreement or conversion of trade secrets.

Third, there is no legal basis whatever for awarding punitive damages.

Four, the award of attorney's fees was wholly without basis.

## II.

# THE CONTENTIONS OF WESTERN IN CASE No. 76-1703, THE SUIT FOR INDUCEMENT OF PATENT INFRINGEMENT

Western's contentions here are that:

First, it was error to refuse to hold that the Beta Corporation was an indispensable party under Rule 19(a), since it was shown to have a vital interest in the lawsuit.

Second, the patent was invalid because of the vagueness and indefiniteness of the claims.

Third, there was a lack of evidence that the principal infringer, Rite-Way of Indiana, in fact infringed. Failure



to prove this is fatal to the inducement to infringe claim, for this is an essential prerequisite.

Fourth, the evidence was insufficient to establish that there was inducement to infringe by Western.

Fifth, there was lack of evidence that the drawings furnished by Western had anything to do with infringement by Rite-Way.

Sixth, the award of damages in the sum of \$491,000, together with trebling, had no support in the record.

We need not discuss in detail all of the issues listed above. We limit our opinion for the most part to: first, whether the release of Rite-Way, Inc. by Sims without any reservation of right provision as required by Utah law precludes prosecution of an action against Western; second, whether there is jurisdiction to entertain the action for alleged breach of the license agreement; and, third, whether the license agreement covenant to return drawings, etc., was violated.

### III.

But first, since we are concerned with the lack of merit of all these claims, we deem it necessary to comment briefly on those that are not discussed in detail in Parts IV, V and VI.

#### *A. Liability for Breach of License Agreement and for Conversion of Trade Secrets*

The issues of breach of license agreement and conversion of trade secrets are closely intertwined. Although the license agreement question is dealt with in detail in Part VI, it is therefore helpful here to discuss enough of the common facts to show why the court's trade secrets finding was meritless.

The plaintiff's complaint alleges a breach of license agreement. The contested license provision calls for a return to the licensor on termination of the license of all drawings, plans and specifications concerning the forward discharge transit mixers. The court, in addition to finding a breach of the license agreement, found on its initiative that the documents or information delivered by Western to Rite-Way of Indiana contained trade secrets which were forbidden to be so delivered.

There is merit in Western's argument that this license agreement did not impose an express prohibition against sending these drawings. Rather, it addressed itself in pinpoint fashion to documents that had been furnished to Western by Sims and were Sims' property. We are told now, and it is not seriously disputed, that the drawings furnished to Rite-Way were prepared by Western in the course of the practical adapting of the patent to the manufacture of the product. Hence, even if one were to imply the promise not to submit drawings, plans, designs and specifications furnished by Sims, the language of this stipulation would not cover the kinds of drawings or information that were furnished.

Further, it was not as if these items were forwarded to a competitor who was on the outside of transactions with Sims. Rite-Way of Indiana had been involved with this product since 1967 and the drawings were forwarded in 1971. True, there had been some changes. Beta Corporation had purchased the patent rights in the intervening period and had extended a license to Rite-Way of Indiana, but Rite-Way had constructed three-axle vehicles before and during this period, had never ceased to do so, and the only thing that was in controversy was the payment of royalties.

The terms of the Beta—Rite-Way of Indiana license agreement provided that it would expire August 31, 1971, if not extended in writing. Thus, the earliest the license

would have expired was August 31, 1971. There is no reason to believe that Western was aware of this.

Since Rite-Way of Indiana had been in the business, it is hard to see how these could have been trade secrets. And because Rite-Way of Indiana had had a license any trade secrets should have been published thereby. That is what a patent and a license agreement are all about. So it is incongruous to talk about trade secrets in this context. The award for conversion of trade secrets is therefore vacated.

Finally, we are at a loss to explain the award of \$100,000 exemplary damages. Since the record reveals nothing to justify a finding that Western acted maliciously, the manifest weight of the evidence is to the contrary.

*B. The Issue as to the Merits of the Claim for Relief on Inducement of Patent Infringement*

As previously noted, the injury inflicted here could have, in view of the time factor, affected only 12 three-axle vehicles.

Section 271(b) of Title 35 U.S.C., is the applicable section. It provides that: "[w]hoever actively induces infringement of a patent shall be liable as an infringer." There is a dearth of evidence to establish that there was an active inducement present in this case. The extent of Western's activity was the transfer of the drawings.<sup>3</sup> This subsection contemplates that the inducer shall have been an active participant in the line of conduct which the actual infringer was guilty of. Thus he should be in the nature of an accessory before the fact. No such activity was here shown. Furthermore, the cases require that it should have been intentional, and here again, there is a dearth of evidence on this point. To the contrary, there was strong posi-

<sup>3</sup> Any activity relating to the 1969 trip report is insubstantial in this regard.

tive evidence that there was no intent whatsoever on the part of Western to induce an infringement. Indeed the undisputed evidence was that its purpose in sending these drawings was to insure that replacement parts for three-axle vehicles would be continued by Rite-Way of Indiana in view of the fact that Western was phasing out its activity in this respect. It is seen from what has been said that the merits of this claim are uncertain and shadowy and likely non-existent.

*C. The Issue of Damages under the Inducement Cause*

The award of \$491,000, the same being the measure of all of the royalties which were allegedly owed by Rite-Way of Indiana to Sims or Beta to compensate for the injury flowing from the giving of these drawings is so disproportionate as to be shocking. It becomes much more than shocking when the \$491,000 is trebled and a commensurate attorney's fee is awarded. There is no more rhyme nor reason to this than there is in the award of the items discussed above. In our opinion, then, this is a wholly unjustified determination of liability and a grossly improper award of damages.

The measure adopted by the court, that is, the loss of royalties as between Sims and Rite-Way of Indiana, spans a long period of time, many years, and embraces manufacture of four and five-axle vehicles that were not described in the drawings furnished. The maximum that could have been affected by the drawings, assuming that the drawings were improperly furnished, would have been limited to 12 three-axle vehicles and royalties totaling \$18,000.



## IV.

DID THE RELEASE BY SIMS OF THE CLAIM AGAINST RITE-WAY, INC. OF INDIANA WITHOUT A RESERVATION OF RIGHT TO PROCEED AGAINST WESTERN CONSTITUTE A RELEASE OF WESTERN ALSO?

We have concluded that the settlement agreement did release Western. If the rule which has been adopted recently by the Supreme Court were to govern, the result might be different. In this case the parties included in the settlement agreement a stipulation providing that Utah law would govern the construction of the agreement. Paragraph 12 of the 1974 agreement states: "[t]his instrument shall in all things be governed by the laws of the state of Utah."

The Supreme Court rulings govern cases in which federal law controls the release question. The decisions enunciating the federal rule are *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964), together with *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971).

*Aro* was a patent infringement case in which Aro Manufacturing Company had furnished material to owners of Ford vehicles for the replacement of patented tops on convertible models. The Supreme Court held that Aro was liable for contributory infringement for supplying replacement fabrics used on vehicles that had been manufactured without a license.

1965 was the dividing line between the sale by Ford of non-licensed vehicles and the sale of licensed vehicles. A settlement agreement was reached in that year between Ford and the convertible company. Aro said that the release of Ford and its joint tort-feasors also impliedly released it, but the Supreme Court held that the release was not effective as to Aro; that a release given a direct infringer which showed an intent to save the releasor's rights

against a past contributory infringer succeeded in preserving the rights. See 377 U.S. at 501.

Recently, the Supreme Court has been more definitive in setting forth standards for release applicable under federal law. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). The Court discussed and rejected two rules: 1) the common law rule that a release of one joint tort-feasor released all other parties jointly liable regardless of the intent of the parties; and 2) the rule that the release of one coconspirator normally releases all others in the absence of reservation of rights, which rule is codified in the Model Joint Obligations Act, 9B U.L.A. 355.\*

The third rule outlined and approved in the Supreme Court's opinion in *Zenith* is that the effect of a release upon co-conspirators is determined in accordance with the intention of the parties. See 401 U.S. at 345. It credits the earlier *Aro* case with having adopted that rule. It also commented that the *Aro* case had refused to give the benefit of a release to the contributory infringer even where there had been no express reservation of the patent holder's rights against contributory infringers.

At bar there is not any express reservation of rights in the settlement agreement against Western or any other inducer or contributory infringer. The release contains no reference showing any intention to reserve rights nor is there any mention of Western notwithstanding that Sims was cognizant of Western's presence as was evidenced by his having reserved his rights of action against Western in connection with the sale of the patent to the Beta Corporation.

\* This provides that the release of an obligor including a joint tort-feasor "shall release co-obligors to the full extent of the obligor's original liability . . . unless the amount of that liability is not known to the obligee . . . or the obligee expressly reserves his rights against the co-obligors." 401 U.S. 344 n. 11.

Since this settlement agreement was not an issue which was preempted by federal law but rather was a common law matter, it was appropriate for the parties to stipulate that Utah law should govern.

As the Supreme Court's opinion noted in *Zenith*, Utah has adopted the Uniform Joint Obligations Act, 2A Utah Code Ann. Sections 15-4-1 to 15-4-7 (1953). The applicable sections are 15-4-3, 15-4-4 and 15-4-5.<sup>5</sup> Section 15-4-1 defines obligor as including persons liable for a tort.

An important aspect of this uniform law is to require that there be a reservation of right as to a joint obligor if the person releasing the principal is to retain rights against the joint obligor. Thus, this statute relieves the harshness of the old common law rule. See *Melo v. National Fuse & Powder Co.*, 267 F. Supp. 611, 613 (D.Colo. 1967), in which the court construed the Utah statute in this manner. The *Melo* court ruled that there had been a release of a joint party where there had been no reservation of right. The court referred to Annot., 73 A.L.R.2d 403, 408 (1960), and it referred also to *Greenalch v. Shell Oil Co.*, 78 F.2d 942 (1935), a case involving a reservation of right clause. The Tenth Circuit in that case interpreted the Utah statute as embodying the reservation of rights rule. It also recognized that the giving of a complete release without reserving a right barred an effort to bring an action against the joint party.<sup>6</sup>

<sup>5</sup> The most important of these is Section 15-4-4 which provides:

Subject to the provisions of section 15-4-3, the obligee's release or discharge of one or more of several obligors, or of one or more of joint or of joint and several obligors, shall not discharge co-obligors against whom the obligee in writing and as part of the same transaction as the release or discharge expressly reserves his rights; and in the absence of such a reservation of rights shall discharge co-obligors only to the extent provided in section 15-4-5.

<sup>6</sup> See also *United States v. First Sec. Bank of Utah*, 208 F.2d

We conclude that the settlement agreement between the Sims interests and Rite-Way of Indiana (and Moran) was a complete and unrestricted release of Rite-Way which contained no reservation of right and which was governed by Utah law, and, therefore, that it effectively released all rights which Sims may have had against Western.'

## V.

### WHETHER THERE IS PENDENT JURISDICTION SO AS TO ALLOW THE TRIAL COURT TO HEAR AND DETERMINE THE BREACH OF CONTRACT CLAIM, CONCEDEDLY A STATE ACTION, IN CONJUNCTION WITH THE EXCLUSIVELY FEDERAL INDUCEMENT TO INFRINGE CLAIM

The guiding light on the subject of pendent jurisdiction is the Supreme Court's decision in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). The trial court applied the *United Mine Workers* rule in holding that there was jurisdiction to consider the alleged contract violation. *Sims v. Western Steel Company*, 403 F. Supp. 450 (1975). This determination was made on summary judgment and without considering the substantiality of the federal claim. *Gibbs* extended somewhat the pendent jurisdiction doctrine as it had been defined in *Hurn v. Oursler*, 289 U.S. 238 (1933), where the doctrine had been circumscribed by the then existing cause of action concept.

424 10th Cir. 1953), involving the giving of a covenant not to sue. We there held that under Utah law a covenant not to sue with reservation of right did not bar an action against one who stood in the shoes of a joint tort-feasor. The Utah statute was referred to in that case.

The Supreme Court of Utah in *Dawson v. Board of Education*, 118 Utah 452, 222 P.2d 590 (1950), reached a like result.

<sup>7</sup> Section 15-4-5 does not affect this case. It deals only with the effect of the obligee's knowledge or lack of knowledge of the released obligor's share of liability in relation to co-obligors.



The requirements set forth in *Gibbs* were, first, that the federal claim must have substance sufficient to confer subject matter jurisdiction on the court, and, second, that the state and federal claims must derive from a common nucleus of operative fact.

Finally, the court said that, considered without regard to their federal or state character, the plaintiff's claims had to be such that he would ordinarily be expected to try them all in one judicial proceeding. Then, assuming substantiality of the federal issues, there was power in federal courts to hear the entire matter. *Gibbs* thus enlarged the discretion of the trial court hearing the case to determine that pendent jurisdiction existed or did not exist.

We are hesitant to condemn in the course of the appeal the finding that the so-called federal claim has substantiality. At least it defines a claim which purports to arise under the patent laws of the United States. Thus, we are reluctant to hold that there was a lack of jurisdiction to try the state claim due to the insubstantiality of the federal claim. So we resolve our doubts and conclude that the trial court had power initially to find and determine whether it had jurisdiction over the federal claim, and also to decide whether the two claims had a common nucleus of operative fact.

It is true that the conduct relied on in both claims was the handling of the drawings by Western. The alleged injury caused in the state case is the breach of the license agreement by nonreturn of the drawings, which constitutes a state law contract action. In the federal case it is contended that the delivery of the drawings triggered patent infringement. We cannot say that these two consequences, if they existed, do not share a common nucleus. The breach of contract is an offshoot of the federal claim and within its ambit. *Cf. Seneca Nursing Home v. Kansas State Bd. of Social Welfare*, 490 F.2d 1324 (1974), and *see Stevens v. Rock Springs National Bank*, 497 F.2d 307 (1974).

## VI.

# WHETHER THE LICENSE AGREEMENT COVENANT TO RETURN DRAWINGS, ETC. WAS VIOLATED

On December 20, 1974, the trial court held in its Partial Summary Judgment that the defendant had breached the License Agreement entered into by the parties by failing to return certain plans and drawings to the plaintiff. The relevant provision of the License Agreement found by the trial court to have been breached by the defendant provides in pertinent part that:

All engineering drawings, plans, designs and specifications covering the Forward Discharge Transit Concrete Mixer within the concept of the Patent Rights of Licensors under this License, shall be upon termination of this License as provided herein, returned to Licensors at the date of termination . . .

(Emphasis added.)

The primary question before the trial court on the motion for partial summary judgment was: what is the plain meaning of return? Judge Ritter applied the plain meaning doctrine. The rule under Utah law is that "[i]f language of the contract is clear and not subject to more than one interpretation, the ordinary plain meaning of the words of the contract must be used." *Petrof Trading Co. v. Intermountain Research and Engineering Co.*, 424 F.2d 704, 706 (10th Cir. 1970). Judge Ritter clearly stated that "[t]he partial summary judgment was made in reliance on the plain meaning of the word ['returned'] absent evidence of any other reasonable construction or intent by the parties at the time the agreement was signed." *Supra*, 403 F. Supp. at 454.

Judge Ritter acknowledged that he should apply the plain meaning doctrine to the term "returned," but this he failed to do. Return means that something which has had

a prior existence will be brought or sent back. This definition is supported by dictionary definitions and case law. The United States Supreme Court, in any early decision, gave this meaning to return. It stated that "'return' implies the prior existence of some state or condition." *Clyatt v. United States*, 197 U.S. 207, 219. A similar definition is set forth in *United States v. Weiss*, 34 F. Supp. 99, 100 (S.D.N.Y. 1940), where the court said "the word 'return' . . . indicates that the desired records and recordings were originally the property of the defendants, which is not the fact. It is impossible to return to them something that they have never possessed." Other courts have applied a similar definition. The Colorado Court has stated that "[t]he word 'return' in its common and accepted use means to bring back or restore, and is a recognition of a right, ownership, dominion or control of the article in one who has not the immediate possession thereof." *See Johnson v. Hilliard*, 160 P.2d 386, 389, 113 Colo. 548 (1945). It is not surprising that Black's Law Dictionary (4th ed. 1951) defines "return" as "[t]o bring, carry or send back; to place in the custody of; to restore; to redeliver; to send back." The American College Dictionary (1970) defines "return" as ". . . to put, bring, take, give, or send back . . ."

The trial court refused to so interpret the word "return." It said:

The agreement, it seems to me, isn't open to any construction. It says all of the stuff should be returned. The use of "return" doesn't, it seems to me, limit the documents to those that on some other time were delivered to them. It is whatever you have, however you got them.

Rec. on App., Vol. I, 9. (No. 75-1849).

From the legal definitions, there can be a return only if there had been a prior delivery.

There is no evidence whatever that any of the plans or drawings sought in this action had been originally sent by Sims to Western. Melvin J. Glade, in an affidavit filed in Opposition to Plaintiff's Motion for Summary Judgment, stated that there were no drawings or written design data tendered to Western Steel Company by the plaintiffs. He stated that Western Steel did subsequently develop its own drawings and design information, but did not develop any significant concepts, patentable ideas or other information which would have enhanced the letters patent. Indeed the trial judge did not find that any drawings or plans were given to Western. In the court's opinion and order it was stated that "engineering drawings as referred to in the license agreement exist and were in the possession of the defendant." *Supra*, 403 F. Supp. at 454. When we view this finding in conjunction with his statement at trial, it appears that "return" meant something to the trial judge quite different from redelivery. In short, he did not find that property once in Sims' possession was not returned to Sims.

There is little or no showing that Sims suffered injury or damage as a result of not receiving drawings. True, Sims argues that he was harmed by not receiving the drawings because he planned to use them to make replacement parts from which he expected to make a profit. But this, a mere expression, was given after the fact. It is more significant that he never made a demand for them from Western until the trial. In a letter dated February 14, 1974, from Sims' attorney to Western purporting to be a notice of breach of the settlement agreement, Sims claimed that he was not notified of the availability of engineering drawings, plans, designs and specifications tendered by the licensee to others and that such information came to his attention just recently. If Sims had in fact intended to



manufacture replacement parts, and if Western's drawings and plans had been necessary for him to do so, it is certain he would have requested these documents long before 1974. It is equally improbable that Sims lacked knowledge of drawings and plans available since he knew that Western was engaged in manufacturing pursuant to the patent and license. Also, Sims was shown to have worked closely with Western while it was engaged in this work.

The undisputed evidence also establishes that the documents were never put out of reach of Sims because the originals were not sent to Rite-Way of Indiana. Copies were made for the use of Rite-Way of Indiana. Therefore, if Sims had really needed the drawings to build replacement parts, he could have had access to them if he had made a simple request (prior to trial). One gets the impression that this entire claim was the product of after-thought. In the face of this record we find it impossible to give any credence to the adjudication and award. In our view it must be vacated.

The judgments of the district court are reversed and the causes are remanded with instructions to dismiss both the actions.

# APPENDIX B

IN THE UNITED STATES DISTRICT COURT IN AND FOR  
THE DISTRICT OF UTAH, CENTRAL DIVISION

Civil No. C 74-131

## Partial Summary Judgment

ROYAL W. SIMS AND THE R. W. SIMS TRUST, *Plaintiffs,*

vs.

WESTERN STEEL CORPORATION, A CORPORATION OF THE STATE  
OF UTAH, *Defendant.*

On Wednesday, the 27th day of November, 1974, at the hour of 2:00 o'clock p.m., the Plaintiffs ROYAL W. SIMS and R. W. SIMS TRUST's Motion for Summary Judgment, pursuant to Rule 56 F.R.C.P., came on regularly for hearing before the Law and Motion Division of the United States District Court in and for the District of Utah, Central Division, the Honorable Willis W. Ritter, District Judge, presiding. The Plaintiff ROYAL W. SIMS was present and represented by his counsel of record, JOHN A. YOUNG of Ft. Wayne, Indiana, who had been previously admitted to practice in the above entitled court for the purposes of this case, together with ROBERT D. MAACK of Salt Lake City, associate Utah counsel; the Defendant, WESTERN STEEL CORPORATION, appeared through its counsel and attorney of record, K. S. CORNABY of Salt Lake City, Utah. The court heard arguments of counsel and the arguments having been concluded, the matter was submitted for determination; the court having read and reviewed and being thoroughly advised as to the facts and information contained in the records and files herein

Now THEREFORE, it is ordered, adjudged, and decreed as follows:

1. Liability is determined to be present and partial summary judgment as to liability alone is hereby entered in favor of the Plaintiffs and against the Defendant for breach of the License Agreement (a copy of which is attached to Plaintiff's complaint as Exhibit D).

2. Plaintiffs are entitled to recover and the Defendant is hereby ordered to surrender all drawings and information as specifically described in paragraph 8 of the License Agreement, (a copy of which is attached to Plaintiffs' complaint as Exhibit D).

3. Defendant is enjoined from transferring any of the drawings and information to any party other than Plaintiffs and shall recover and account for any drawings and information conveyed to others.

4. A separate hearing shall be set to determine the issue of damages.

5. Plaintiff and the same is hereby awarded a judgment for his costs incurred to date in bringing this action.

DATED this 20th day of December, 1974.

/s/ WILLIS W. RITTER  
WILLIS W. RITTER  
Chief United States  
District Judge

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

ROYAL W. SIMS and the R. W. SIMS TRUST, *Plaintiffs*,

v.

WESTERN STEEL COMPANY, a corporation of the State of Utah, *Defendant*.

Civ. No. C 74-131

UNITED STATES DISTRICT COURT, D. UTAH.

Sept. 23, 1975.

Patent licensors brought action against licensee for infringement of patent and breach of license agreement. The District Court, Ritter, Chief Judge, held that court had pendent jurisdiction over state breach of contract claim; that licensors were entitled to judgment on the contract claim; that licensee, by refusing to return certain plans and specifications as required in license agreement and in instead selling the plans to a known competitor of the licensors, converted certain trade secrets of the licensors; that licensors were entitled to \$191,000 in damages for lost profits, \$150,000 for conversion of the trade secrets, and \$100,000 in punitive damages.

Order accordingly.

• • • • •

John A. Young, Fort Wayne, Ind., for plaintiffs.

George M. McMillan, Paul L. Badger and K. S. Cornaby, Salt Lake City, Utah, for defendant.

Opinion and Order

RITTER, Chief Judge.

The plaintiffs, Royal W. Sims and the R. W. Sims Trust, brought this action under 28 U.S.C. Section 1338(a)



(1970)<sup>1</sup> and 35 U.S.C. Section 271(b) (1952)<sup>2</sup> alleging infringement of Patent No. 2,859,949 by the defendant, Western Steel Company. Plaintiffs seek a permanent injunction against further infringement of the patent by the defendants, an accounting of all profits realized by the defendant as a result of the alleged infringement, damages and attorney fees.

### I.

In December of 1968 this Court issued an order of dismissal in the matter of *Sims v. Western Steel Co.*, Civil No. C 215-67 (D.Utah, Dec. 13, 1968) pursuant to a stipulation for dismissal dated December 13, 1968. The parties also entered into a settlement agreement dated December 14, 1968 and a license agreement dated December 12, 1968. The license agreement provided in part that:

All engineering drawings, plans, designs, and specifications covering the Forward Discharging Transit Concrete Mixer within the concept of the Patent Rights of LICENSOR under this License, shall be upon termination of this License as provided hereinabove, returned to LICENSOR at the date of termination. And further, LICENSEE shall assign to LICENSOR at the termination of this License, any and all improvements, pending applications, patents or letters patent with respect to further inventions on or in connection with the Front End Discharging Transit Concrete

<sup>1</sup> 28 U.S.C. § 1338(a) (1970) reads:

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patent, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

<sup>2</sup> 35 U.S.C. § 271(b) (1952) reads:

(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

Mixer concept, together with all designs and blueprints relating to the manufacture and assembly thereon.

In 1971 the defendant, Licensee, sold engineering drawings, plans, designs and specifications covering the front end discharging transit concrete mixer to Rite-Way, Inc. of Indiana.

After a hearing on plaintiffs' motion for summary judgment this Court issued an order of partial summary judgment for the plaintiffs on December 20, 1974. The order determined that the defendant is liable to the plaintiffs for breach of the license agreement.

Defendant subsequently moved to set aside the order granting a partial summary judgment on the grounds of a lack of jurisdiction and that there are issues of material fact which must be resolved before summary judgment may be granted. The factual issues asserted are: (1) whether the plaintiff is the owner of Patent No. 2,859,949, (2) whether the Patent is valid, (3) whether the defendant actively induced infringement of the Patent, (4) whether Rite-Way, Inc. utilized the materials sold them by the defendant to infringe upon plaintiffs' rights, (5) whether the settlement agreement releases and discharges any rights plaintiffs may have had against defendant as a contributory infringer of the Patent, and (6) whether the word "returned" in the license agreement obligated the defendant to deliver all drawings, plans, designs or specifications covering the forward discharging transit concrete mixer to the plaintiffs. Defendant also filed a suggestion of lack of jurisdiction.

### II.

#### A. Jurisdiction

In suggesting a lack of jurisdiction the defendant relies on *Hurn v. Oursler*, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed.

1148 (1933), in which the Court, at 246, 53 S.Ct. at 589, distinguished

... between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal ground; in the latter it may not do so upon the non-federal cause of action.

This formula, however, has been considerably modified by the United States Supreme Court since the adoption of the Federal Rules of Civil Procedure. In *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) the Court held that:

Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .," U.S.Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103 [53 S.Ct. 549, 77 L.Ed. 1062].<sup>3</sup>

In the instant case the plaintiffs have presented two causes of action, one federal in nature and one state, de-

<sup>3</sup> 383 U.S. at 725, 86 S.Ct. at 1138 (footnote omitted, brackets and ellipses in original).

rived from the same operative facts. The federal claim is substantial. Plaintiffs' claim of patent infringement under 28 U.S.C. Section 1338(a) (1970) and 35 U.S.C. Section 271(b) (1952) is one over which the United States District Courts have exclusive and original jurisdiction. That claim has not been dismissed or shown to be spurious. The claim has not been abandoned by the plaintiffs. Therefore this Court possesses and has properly exercised jurisdiction to hear and decide the pendent state claim.

#### B. Issues of Material Fact

The Court is not persuaded by defendant's assertion of numerous items of material fact which need to be decided prior to granting summary judgment for the plaintiffs on the pendent state claim.

The first four issues asserted: (1) whether the plaintiff is the owner of Patent No. 2,859,949, (2) whether the Patent is valid, (3) whether the defendant actively induced infringement of the Patent, and (4) whether Rite-Way, Inc. utilized the materials sold them by the defendant to infringe upon plaintiffs' rights, are not relevant to the partial summary judgment. These are issues of fact related to plaintiffs' federal claim of inducement to infringe on patent rights not to the pendent claim of a breach of the license agreement. Even if issues 1 & 2 were crucial to the partial summary judgment the Court has not heard any persuasive argument to indicate that the plaintiffs do not own a valid patent, No. 2,859,949.

Under the decision of the Supreme Court in *United Mine Workers v. Gibbs*, *supra* and the cases which have followed<sup>4</sup> it is not necessary for this Court to enter final

<sup>4</sup> See *Rosado v. Wyman*, 397 U.S. 397, 403-05, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970); *Hagans v. Lavine*, 415 U.S. 528, 545-50, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); *Stevens v. Rock Springs Nat'l Bank*, 497 F.2d 307, 310 (10th Cir. 1974).



judgment on the federal claim prior to deciding the non-federal breach of contract claim.

Defendant's fifth issue, whether the settlement agreement releases and discharges any rights plaintiffs may have had against defendant as a contributory infringer of the patent, also deals with the federal claim. Further, on this point counsel has misinterpreted the federal cause of action. The plaintiffs have alleged that the defendant is guilty of inducement to infringe not of contributory infringement. In any case there is no indication that the settlement agreement releases and discharges any rights plaintiffs may have against defendant for a breach of contract.

Defendant's sixth issue, whether the word "returned" in the license agreement obligated the defendant to deliver all drawings, plans, designs or specifications covering the forward discharging transit concrete mixer to the plaintiffs, or only those which were delivered by the plaintiffs to the defendant prior to the termination of the license agreement, has already been ruled upon by this Court. The uncontested facts are as follows. First, the parties entered into a license agreement. Second, the agreement provided that upon termination of the agreement "all engineering drawings, plans, designs, and specifications covering the Forward Discharging Transit Concrete Mixer within the concept of the Patent Rights of LICENSOR under this License, shall be . . . returned to LICENSOR at the date of termination." Third, the license agreement has ended and been ended for several years. Fourth, engineering drawings as referred to in the license agreement exist and were in the possession of the defendant. Fifth, while demand has been made the drawings, plans, designs and specifications have never been returned to the plaintiffs.

With such uncontroverted facts before the Court it would require a contorted definition of "return" to find that the defendant has not breached the agreement. The partial summary judgment was made in reliance on the plain mean-

ing of the word absent evidence of any other reasonable construction or intent by the parties at the time the agreement was signed.

For the foregoing reasons defendant's motion to set aside the order granting partial summary judgment is denied.

### III.

Having determined that the partial summary judgment was properly granted under Rule 56(d) the question of damages remains. The case law in Utah is clear on the types and measures of damages which may be awarded in cases involving a breach of contract. The purpose of damages is, of course, to restore the plaintiffs to the position they would have been in but for the wrongdoing of the defendant. *Park v. Moorman Mfg. Co.*, 121 Utah 339, 241 P.2d 914 (1952) Once the injured party has established that some damage has been suffered it falls upon the court to determine the measure of damages. It is not necessary that the proof of damages be exact. As the Utah Supreme Court stated in *Gould v. Mountain States Tel. & Tel.*, 6 Utah 2d 187, 309 P.2d 802 (1957):

Where the plaintiff has shown actual loss of business during the period as a result of defendant's breach of contract, he will not be denied recovery because the exact amount of damage cannot be readily ascertained. *Id.* at 192, 309 P.2d at 805 (footnote omitted).

This rule is designed to insure that a wrongdoer may not escape liability due to uncertainty of the amount of damages actually suffered by the other party.

Utah's rule regarding profits is also clear. Prospective profits from a business that has yet to be established are too uncertain and speculative to serve as a basis for recovery. *Jenkins v. Morgan*, 123 Utah 480, 260 P.2d 532 (1953); *Van Zyverden v. Farrar*, 15 Utah 2d 367, 393 P.2d 468

(1964). Where, however, damages are suffered by an ongoing business they "... need only be proved with sufficient certainty that reasonable minds might believe from a preponderance of the evidence that the damages were actually suffered." *Howarth v. Ostergaard*, 30 Utah 2d 183, 187, 515 P.2d 442, 445 (1973). In such cases lost profit as well as compensation for damage to the good will of the business may be awarded. *Trans-American Collections, Inc. v. Continental Accounting Service House, Inc.*, 342 F.Supp. 1303 (D.Utah 1972).

Punitive damages may also be awarded in such cases as the conduct is shown to be both wilful and malicious. *Trans-American Collections, Inc., supra*.

In this case the plaintiffs seek compensatory damages of \$191,426.00, damages for conversion of trade secrets of \$400,000.00, punitive damages of \$250,000 plus costs and reasonable attorney fees.

Plaintiffs in support of compensatory damages established the following facts. Sims pioneered development of a three-axle mixer which in 1968 he licensed Western to manufacture under the license agreement previously discussed. At that time a third company, Rite-Way, Inc. of Indiana, was engaged in the manufacture of a four-axle mixer in competition with Western and Sims. No other company was manufacturing three-axle mixers at that time. In 1971 Western sold the drawings and specifications belonging to Sims to Rite-Way Inc. Rite-Way then began to manufacture three-axle mixers in competition with Sims. As a direct result of information supplied to Rite-Way by Western, from 1969 to 1971, Rite-Way also acquired a substantial and profitable business in replacement parts for the tree-axle mixers. From 1971 through 1974, according to the testimony of Mr. William F. Bowen, Vice President and General Manager of Indiana Rite-Way Truck Co. and Vice President of American Rite-Way Truck Sales, Inc. from March, 1972 through July, 1974, Rite-Way made a

gross profit of \$230,000.00 from its replacement parts business for three-axle mixers.

Testimony on lost profit was also given by Mr. Royal W. Sims. Mr. Sims, a plaintiff in this case, invented his first truck in 1960 and has produced vehicles such as the three-axle mixer since 1964. At the same time he began his replacement parts business. In his testimony Mr. Sims demonstrated his knowledge of the replacement parts business and the wear life of the mixers in operation. The Court found him to be a credible and experienced witness, expert in his field. Using the records of his company Mr. Sims prepared and presented figures which isolated and calculated the loss of gross profit to his company in the replacement parts business for three-axle mixers from 1971 through 1974 to be \$283,000.00. He further testified that based upon those records and his opinion the loss of net profit for that same period was \$191,426.00. The Court accepts this figure as the loss of net profit for that period on the replacement parts business for three-axle mixers suffered by plaintiffs as the foreseeable, proximate result of defendant's breach of contract. This lost profit is not speculative as in the case of a business to be established in the future. It is also supported by the figures presented by Mr. Bowen in his testimony. The plaintiffs are entitled to an award in that amount.

The testimony presented regarding the loss to the plaintiffs by defendant's conversion of trade secrets was conflicting. The Court, however, is satisfied by a fair preponderance of the evidence that the conversion resulted in a loss to the plaintiffs of at least \$150,000.00. This loss was the direct, foreseeable and proximate result of defendant's wrongdoing.

The Court finds no merit to the defendant's suggestions of a bar to recovery in this area due to the release of a joint tort feisor or of defendant's claim that plaintiffs



could have mitigated damages by purchasing a copy of the plans and drawings from Western. By making these documents available to others for a nominal charge Western effectively destroyed much of the value of the plans and drawings to Sims. For Sims to have purchased a copy from Western would have been pointless.

The defendant in this case breached the license agreement not only by refusing to return the plans and drawings to the plaintiffs but also by making these items available to a known competitor of Mr. Sims for a nominal fee. The Court after hearing all the testimony and examining all the evidence can only conclude that the conduct of the defendant was wilful and malicious. Such bad faith conduct rises to a level that requires the Court to take severe action. Such attempts to destroy the business property of another must be discouraged. Because this Court finds the conduct to have been wilful and malicious and in order to deter such conduct by others the defendants are ordered to pay punitive damages in the amount of \$100,000.00.

In summary the plaintiffs are entitled to receive from the defendant compensatory damages of \$191,426.00, damages for conversion of trade secrets in the amount of \$150,000.00, punitive damages of \$100,000.00, plus costs and reasonable attorney fees.

It is so ordered.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

ROYAL W. SIMS, Trustee, and R. W. SIMS TRUST  
*Plaintiffs,*

vs.

WESTERN STEEL COMPANY, a corporation of the State of  
Utah  
*Defendant*

(Filed in United States District Court, District of Utah)  
(June 8, 1976)

Civil No. C-74-131

**Findings of Fact and Conclusions of Law  
and Judgment**

This Honorable Court, having found for the Plaintiffs on hearing dated April 28, 1976, following final argument by counsel for the above respective parties, finds the facts and states the conclusions of law as follows:

**FINDINGS OF FACT**

1. The R. W. Sims Trust is a trust organized under the laws of the State of Utah.
2. Royal W. Sims, Trustee, is an individual residing in the State of Utah and is Trustee of the R. W. Sims Trust.
3. Western Steel Company is a corporation organized under the laws of and doing business in the State of Utah.
4. Royal W. Sims and R. W. Sims Trust are the owners by assignment of all rights, title and interest in the United States Patent No. 2,859,949 issued to J. Jack Willard on November 11, 1958 and entitled "Forward Dis-

charging Transit Concrete Mixer" (hereinafter referred to as the Willard Patent).

5. On or about the year 1965, Western Steel Company (hereinafter sometimes referred to as Western) received an exclusive license under the Willard Patent from Plaintiffs for the purpose of manufacturing forward discharging concrete mixers.

6. The granting of the 1965 exclusive license agreement was predicated upon Plaintiff's lack of sufficient capital to finance large scale production of the large and expensive forward discharging concrete mixer machines and upon Plaintiff's agreement to assist Western Steel Company in the development of the product.

7. In 1967, litigation developed between the same parties to present suit and involving the same subject matter, i.e. the Willard Patent. The previous litigation is identified as *R. W. Sims et al v. Western Steel Company*, Civil No. 215-67 (D. Utah 1967). Starting with the 1967 litigation and continuing to the present date the court finds a history of litigation which has been, with brief interludes, virtually continuous and has been unnecessarily protracted by the actions of Western Steel Company.

8. On December 16, 1968, the 1967 action was dismissed by this Court, with prejudice, upon stipulation of the parties and motion to this Honorable Court.

9. Defendant Western Steel Company, by the stipulation, dated December 16, 1968, agreed with the order of the Court that the Willard Patent was valid.

10. Pursuant to the stipulation between the parties, this Court entered an order of dismissal with prejudice incorporating the stipulation, such order dated December 16, 1968. The parties to the present and previous suit also concurrently entered into an agreement whereby Western Steel Company was given a nonexclusive nontransferrable

license to exhaust its inventory. Western agreed to terminate its manufacture of forward discharging concrete mixers covered by the Willard Patent upon the completion of 200 trucks which were to be manufactured from Western Steel Company's then existing inventory. In no event was such further manufacture to extend beyond the 12th day of March, 1971. Western Steel further agreed to return all working drawings, designs and such other technical information as it had in its possession relating to the manufacture, use and sale of forward discharging concrete mixers.

11. During the period when Western Steel Company was a licensee of Plaintiffs, the parties agreed to a reasonable royalty of \$1,000 per unit for each three-axle forward discharging mixer manufactured and a reasonable royalty of \$1,500 for each four-or-more-axle forward discharging mixer manufactured.

12. This royalty was temporarily reduced upon termination of the license agreement between Plaintiffs and Western Steel Company to prevent financial hardship on Western and to permit them to manufacture a limited number of units from inventory.

13. The drawings, designs and other technical information in the possession of Western Steel Company, as of December 1968, represented the combined knowledge of Plaintiffs and Defendants, developed and accumulated in the course of Western's production of approximately 123 forward discharging concrete mixers.

14. Western failed to return the drawings, designs and technical information as agreed. Instead Western gratuitously offered Rite-Way, Inc. of Indiana, Plaintiffs' competitor, the entire store of knowledge.

15. The Plaintiffs, R. W. Sims et al., brought the present suit against Western Steel Company alleging patent infringement and breach of agreement and seeking, inter



alia, to effect the return of the drawings, designs and technical information. This Court, in the present suit, found that Western Steel Company was in breach of its contractual obligations. Consequently this Court rendered partial summary judgment for the Plaintiffs on December 20, 1974.

16. Rite-Way, Inc. of Indiana (hereintfter referred to as Indiana) is a business organized under the laws of and doing business in the State of Indiana, having a principal place of business at 320 Ernst Court, Fort Wayne, Indiana.

17. Plaintiffs granted a limited license to Indiana to manufacture four-or-more-axle forward discharging transit concrete mixers. This limited license terminated in 1966. Indiana continued, however, to manufacture four-or-more-axle forward discharging transit concrete mixer units on a greatly reduced scale.

18. On or about August of 1969, employees of Indiana (the competitor of Plaintiffs) were invited to the Western Steel Company facility in Salt Lake City to review those facilities and to receive both technical information and customer data.

19. The then purchasing agent of Indiana went to the facilities of Western Steel Company and was given substantial technical information, including customer lists, vendor and source lists, and other information useful in the manufacture, use and sale of a 'three-axle forward discharging transit concrete mixer' as manufactured by Western Steel Company.

20. Western Steel Company knew at the time it transferred its technical data, specifications, drawings, customer lists, plans and designs to Indiana that Indiana was actively engaged in the manufacture of transit concrete mixers.

21. Western Steel Company was aware that Indiana was interested in entering the three-axle forward discharging concrete mixer market.

22. Indiana, at the time it acquired the technical data from Western Steel Company, was not licensed by Plaintiffs to manufacture or sell forward discharging transit concrete mixers and was, in and after 1970, operating under the protection of a bankruptcy court.

23. Unlicensed manufacture of three, four and five axle forward discharging transit concrete mixers by Indiana, subsequent to the transfer thereto by Western of the drawings, designs and technical information, was a natural and direct result of the transfer.

24. A "three-axle forward discharging transit concrete mixer" is legally saleable in all of the fifty states of the United States. Whereas, four-or-more-axle forward discharging transit concrete mixers are legally saleable in only eleven or twelve of the fifty states in the United States.

25. Prior to 1971, Indiana had been unsuccessful in entering the three-axle forward discharging concrete mixer business although it had produced two prototypes of such a unit.

26. During 1971, while Indiana was operating under the protection of the bankruptcy court and in response to a request by Indiana to Western for additional drawings, Western offered to sell Indiana, at a nominal price of \$109.31, more than 231 of Western's drawings involving such data as critical specifications, the construction of component parts, location of components, arrangement of drive line, wheel and axle holding bases, and the like.

27. The drawings, designs, technical information and the like possessed by Western Steel Company represented an accumulation of the experience and knowledge they had

gained from the construction of 123 trucks, the inspection and use of Plaintiffs' tools, dies, fixtures and facilities and the periodic discussions and consultations which Defendant held with Plaintiffs.

28. Indiana, at the time it acquired the information from Western, lacked the technical knowledge and ability to manufacture and sell successfully the three-axle forward discharging concrete mixer.

29. With the aid of the technical information, drawings and the like provided by Western, Indiana was able not only to successfully and rapidly enter the three-axle forward discharging concrete mixer business, but also to broaden its market for all sizes of trucks.

30. Entry into the three-axle forward discharging concrete mixer business enabled Indiana to construct four- and five-axle forward discharging concrete mixers from a common inventory because many parts for the three, four and five-axle trucks are standardized.

31. As a further consequence of obtaining the designs, drawings, specifications, vendor lists and customer lists from Western, Indiana was able to successfully enter the highly-profitable aftermarket business (replacement parts and service) by selling largely to Western's customers.

32. With the aid and assistance of the drawings, designs, technical information and specifications provided by Western, Indiana moved swiftly from the position of an unprofitable and insolvent business to a steadily improving position of profitability for the period extending from 1970 through 1973, making substantial gains in profitability for each of said years.

33. Plaintiffs were unable to press or collect royalty claims against Indiana by reason of the bankruptcy laws which prevent the enforcement of the patent claims; such claims being "not proven or provable" against a party

operating under the protection of a Chapter XI bankruptcy.

34. Plaintiffs are the owners of Travel Batcher, Inc., a corporation organized under the laws of and doing business in the State of Utah and actively engaged in the business of manufacturing forward discharging transit concrete mixers and Plaintiffs' intended successor to the Western Steel Company manufacturing business under the exclusive license.

35. The primary purpose for requiring the return of all drawings, designs and technical information in the possession of Western Steel Company was to facilitate re-entry of Plaintiffs into the business of manufacturing forward discharging transit concrete mixers, to enter the lucrative aftermarket business, and to prevent these materials from falling into the hands of Plaintiffs' competitors.

36. Plaintiffs began the necessary steps to acquire the stock of Indiana for the following reasons:

a) to prevent further infringement of the Willard Patent.

b) to stop the unlicensed, direct competition by Indiana with Plaintiffs, and

c) to enable Plaintiffs to obtain past royalties and lost profits.

37. Plaintiffs' plan of acquisition was commenced by first acquiring 12½% of the stock of Indiana. Further acquisition was prevented and rendered impractical and impossible by the rapid increase in profitability of Indiana brought about by the intervention of Western. The loss of profit to Plaintiffs was a natural and foreseeable result of the wrongful intervention by Western. The rapid and substantial change of Indiana from an insolvent company to a profitable company was made possible because of Indiana's



successful increased production of forward discharging transit concrete mixers in violation of Plaintiffs' patent rights. The profit generated by Indiana was a direct result of the information and technical knowledge provided to Indiana by Western Steel Company.

38. Indiana subsequently was removed from Chapter XI bankruptcy by a plan of reorganization.

39. Indiana showed on its books at the time of its removal from Chapter XI bankruptcy, as a royalty reserve, a total of \$491,000 due and owing Plaintiffs for units manufactured in infringement of the Willard Patent.

40. As part of the reorganization plan for Indiana, Indiana was purchased by Moran Tank Company. Moran Tank Company agreed to pay Indiana's obligations to Plaintiffs in exchange for a release from Plaintiffs.

41. No portion of this \$491,000 has been paid to Plaintiffs.

42. In or about February 1974, Plaintiffs released Indiana and Moran Tank Company from infringement claims. However, Plaintiffs never intended that Western, which had provided all of the customer lists, drawings, designs, and technical data to Indiana would benefit from this release. Western was not mentioned or alluded to in the release of Moran Tank Company and Indiana. There was no evidence apparent to Plaintiffs that Western Steel Company had become deeply involved with Indiana. There was no reason to think that Western would breach its agreement with Plaintiffs by giving such aid and assistance to Indiana.

43. The forward discharging transit concrete mixer covered by the Willard Patent is a substantial and pioneer invention that has satisfied a long-felt need in the industry.

44. The forward discharging transit concrete mixer covered by the Willard Patent has been widely copied. The

Willard Patent has been the subject of many license agreements between Plaintiffs and companies such as, but not limited to, C.M.C., Advance Mixer, Inc., Front Discharge Mixer, Inc. and Western Steel Company.

45. The Willard Patent has been the subject of substantial litigation and, in all instances, the litigation has been terminated by agreements between the parties, wherein the validity and infringement of the Willard Patent have been admitted.

46. All of the units manufactured by Indiana subsequent to their obtaining the drawings, designs, and technical information from Western in August, 1969 constitute infringement of the Willard Patent, as each unit incorporates the same patented construction and design. The post 1969 infringement was induced by Western Steel Company.

47. There is a correspondence between each element of Claims 7 through 12 of the Willard Patent and a counterpart element of the accused Indiana construction. The claimed elements of the patent and the corresponding elements of the accused construction function in the same manner, to produce the same result. The accused construction and the patented construction are virtually identical in both functional and structural aspects and therefore one is the infringement of the other.

48. The Court finds that the inducement by Western to infringe Plaintiffs' patent was knowing and willful. The facts support a finding of intentional infringement by revealing a total disregard for the patent and contractual rights of Plaintiffs. Such a finding is further supported by the fact that Western deliberately withheld the drawings, designs, data, customer lists and specifications from Plaintiffs and deliberately gave that same material to Indiana, the competitor of Plaintiffs, for the known and intended

purpose of inducing infringement by Indiana and causing willful harm to Plaintiffs.

49. Indiana's use of the information obtained from Western caused incalculable and devastating harm to Plaintiffs, such as lost profits, lost customers and lost markets.

50. The Court notes the advanced age of the Trustee and founder of Plaintiffs' business for the development and manufacture of forward discharging units. The Trustee is no longer able to continue the business under the protection of a now-expired patent and in the face of the Western-induced competition by Indiana. The Court finds that the Trustee was the party who pioneered the development and construction of this unit and was deprived of both the patent rights and the use of enjoyment of his pioneering efforts by the actions of Western Steel Company.

51. The Court finds Western's conduct unconscionable in that more than half the life of the patent was expended in wasteful, nonproductive disputes. As a result, Plaintiffs have derived no benefits under either the patent or the contract which formed the basis of a dishonored settlement entered into between the parties pursuant to order of this Court.

#### CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter and parties to this litigation under 28 USC 1338(a), 28 USC 1338(b) and 35 USC 281.

2. The Court finds a history of litigation which has been protracted unnecessarily by the action of Western Steel Company and the deliberate withholding of technical information from Plaintiff, in breach of the agreement to return such information.

3. The transfer of the drawings, designs and technical information to Indiana by Western was done intentionally

and with full knowledge by Western that such information could and would be used to infringe the Willard Patent.

4. The transfer of the drawings, designs and technical information by Western to Indiana was done with full knowledge that Indiana would enter into direct competition with Plaintiffs and was, therefore, an inducement to infringe under 35 USC 271(b).

5. Infringement of the Willard Patent by Indiana, given the means to do so by Western, was a natural and foreseeable consequence of the transfer of the aforementioned drawings, designs and technical information.

6. Inducement to infringe under 35 USC 271(b) is made by statute a separate and distinct tort from direct infringement arising under 35 USC 271(a).

7. Claims 7 through 12 read in light of the specification of the Willard Patent are literally infringed by each and every one of the units manufactured by Indiana.

8. The unlicensed manufacture, use and sale of three-, four- and five-axle trucks by Indiana constitutes a direct infringement of the Willard Patent under 35 USC 271(a).

9. A defense of non-infringement is inapplicable to claims 7 through 12, where the defense is based on limitations appearing in claims 1 through 6. Claims 7 through 12 do not contain such limitations and are thus clearly and unmistakably infringed by the accused construction.

10. There is a presumption of validity of the Willard Patent, 35 USC 282.

11. It is not the burden of Plaintiffs to show validity of the patent, but rather the burden of the party asserting invalidity to plead such as an affirmative defense and to establish the same. 35 USC 282(a).

12. Where parties have terminated litigation by stipulation, abandoning all claims of invalidity of the patent



and where the stipulation is incorporated into and made a part of an "Order of Dismissal With Prejudice", the Order of Dismissal is on the merits and the issue of validity may not thereafter be relitigated or raised between the same parties under the doctrine of res judicata.

13. "Release" is an affirmative defense which must be pleaded and proved, FRCP 8(c).

14. The affirmative defense of release is governed by federal law when the release pertains to a federal right.

15. The law of the State of Utah on release is inapplicable when the release relates to a federal right.

16. A release is only effective as to those parties of whom the releasor has knowledge and consciously intends to release.

17. A release granted to one party for infringement does not release a separate and distinct party from liability for inducement to such infringement, particularly where inducement to infringe is made, by statute, a separate and distinct tort.

18. Where Defendant fails to plead an affirmative defense based upon release, after having been admonished, more than one year prior to trial, by the Court to so amend its pleading, leave will not be granted on the day of trial to add such a defense.

19. A late request to add an affirmative defense, based upon release, when the party has had knowledge of the affirmative defense two years before the date of trial and before the commencement of the litigation imposes an unreasonable burden upon the Court and the opposing party and refusal to grant leave to so amend the pleadings is within the discretion of the Court.

20. A two year delayed motion to add an affirmative defense based upon release, coupled with a demand for a

jury trial, by a party having knowledge of the defense and having been admonished by the Court more than one year prior to the trial to add the defense, will be denied.

21. The right to a jury trial is waived, FRCP 38(d), by failing to make a demand therefor within ten days following the last responsive pleading, FRCP 38(b). The untimely demand for a jury trial, even if made within ten days of the last relevant pleading does not revive waived rights to a jury trial arising under the original pleadings.

22. A Defendant seeking to amend its pleadings to add an affirmative defense must do so in a timely manner, particularly where such an affirmative defense is coupled with a demand for a jury trial effective for that issue only.

#### DAMAGES

1. The measure of damages for patent infringement is stated under 35 USC 284 which provides for the award of damages to the claimant adequate to compensate for the infringement, but in no event less than a reasonable royalty.

2. The Court may award damages to the claimant equal to his lost profits, without an accounting, when the last profits are clear from the evidence.

3. The Court may award damages for inducement to infringe equal to the lost profits of the patent owner, when the district infringement is a natural and foreseeable result of the inducement.

4. The damages in this case shall be assessed as the lost profits of the patent owner.

5. The Court finds damages to the Plaintiffs in the amount of \$491,000, which represents the aggregate total loss of profit to Plaintiffs by reason of the tortious intervention of Western.

6. The lost profits of Plaintiffs amount to \$491,000 which is the total accrued royalties of Rite-Way, Inc. of Indiana to which Plaintiffs were entitled and would have received but for the tortious intervention of Western.

7. The Court may increase damages up to three times the amount found and assessed:

a) when the inducement to infringement is done knowingly, intentionally and in complete disregard of the rights of the patent owner;

b) where the validity of the patent is decided by res judicata arising from prior litigation; and

c) where the scope of the patent is known between the parties from extensive prior investigation and protracted litigation.

8. The Court may assess attorney fees under 35 USC 285 in exceptional cases such as, where the litigation has been unnecessarily protracted and lengthened by the non-prevailing party and has necessitated long and involved proceedings concerning a matter which is essentially uncomplicated, said litigation extending through multiple suits over a nine year period.

9. The Court may treble damages on a finding of bad faith in the conduct of one of the parties. The facts clearly show that Defendants conduct constituted an inducement to infringe a patent in direct breach of an agreement stipulated to by the parties. Such conduct strongly evidences the willful disregard for the adjudicated rights of the Plaintiffs to full enjoyment of their patent and contract rights.

10. The Court may further grant costs of litigation to the prevailing party under 35 USC 285, such assessment being within the discretion of the Court when it finds that the infringement has been committed knowingly, inten-

tionally and where there is no reasonable doubt as to the validity of the patent.

### JUDGMENT

Judgment is rendered for the Plaintiffs. Damages are assessed at \$491,000, which damages are trebled. The Court assesses against Defendant costs and the Defendant shall pay to Plaintiffs reasonable attorney fees, which amount shall be established and proved by submission of supporting data satisfactory to this Court.

So entered this 8 day of May, 1976.

/s/ WILLIS W. RITTER  
Willis W. Ritter, Chief Judge  
United States District Court



**APPENDIX C**

SUPREME COURT OF THE UNITED STATES

No. A-1046

ROYAL W. SIMS AND R. W. SIMS TRUST, *Petitioners*,

v.

WESTERN STEEL COMPANY

**Order Extending Time To File Petition  
For Writ of Certiorari**

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 21, 1977.

/s/ BYRON R. WHITE

Associate Justice of the Supreme  
Court of the United States

Dated this 11th day of June, 1977.

**APPENDIX D**

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. ———

ROYAL W. SIMS AND THE R. W. SIMS TRUST, *Petitioners*

v.

WESTERN STEEL COMPANY, *Respondent***Affidavit**

I, Willis W. Ritter, residing at Salt Lake City, Utah, am the Chief Judge of the United States District Court for the District of Utah, and on my oath, I declare the following to be true to the best of my information and belief:

The citizens of Utah and of the United States have a legitimate interest in preserving the integrity of the federal judicial system in our State. I believe that system is eroding badly in Utah.

An unfortunate situation prevails in the Tenth Circuit with which the District Court over which I preside is located. It is essential to call this matter to the attention of the Supreme Court of the United States, so that, in its capacity as supervisor of the federal judicial system, it may attempt corrective steps. The judicial process now followed seriously threatens the ability of parties who have tried cases in my court to receive fair and impartial justice on appeal.

At the outset, I would like to make it clear that I am not interested in any way in the outcome of the case in connection with which this affidavit is submitted. But since I am constitutionally permitted to speak in my judicial capacity only in cases and controversies, I have agreed to provide the petitioner for certiorari in this case this affidavit to bring my views to the attention of the Supreme Court. I

have no connection, financial or personal, with any party or attorney in this case. I do have the conviction that a proper judgment rendered by my Court has been wantonly reversed on the basis of extra-judicial considerations.

I have served on the federal bench for 27 years. Parties who come before me have the right to a fair trial and, I believe, they get it. No less, if an appeal is taken, they have a right to an even-handed, unbiased hearing on appeal. The right to receive such a hearing on appeal from my court has been frustrated by the personal hostility directed against me by the Chief Judge of the United States Court of Appeals for the Tenth Circuit, Judge David T. Lewis, and by several of the other judges who sit on that Circuit Court. If the differences between me and Judge Lewis and his colleagues were confined to mere differences of opinion on judicial policy or judicial administration, I would not bring the matter to the attention of the Supreme Court. However, rancor has so permeated the Tenth Circuit's relationship to me and, as a result, to the judgments from and the proceedings in, my court, that the rights of litigants to due process have been compromised. I, thus, feel compelled to speak out.

(I have also prepared and am filing with the Judicial Conference for the Tenth Circuit a statement describing what I believe to be the underlying basis for the controversy between my court and the Tenth Circuit Court of Appeals, but that is beyond the scope of this Affidavit.)

That litigants before my court are denied a fair hearing on appeal is evident from a comparison of the rate at which judgments of my court are reversed by the Tenth Circuit, when compared to the rate at which my decisions were reversed by the Ninth Circuit while I served by designation as a District Judge of the United States District Court for the Northern District of California. Chief Judge Lewis F. Goodman of the Northern District of California (now deceased), requested me to sit, and I did so sit, as a United

States District Judge in his District for a period of six years from 1954 to 1960, for intervals of two to four months per year. This is an arrangement which was continued with great satisfaction to all throughout the six years. My decisions were subject to appellate review by the Ninth Circuit Court of Appeals. Although the figures are not readily available, I know that of the [nearly 100] decisions rendered on the merits, the rate of reversal was no greater than the average 15% to 20% rate of reversal all appeals take in the federal courts. In contrast, it was reported last year in connection with S. 1130, A Bill Relating to Chief Judge—Grandfather Clause, that over the period of 1949-1975, of the reported civil decisions alone, 58% of my decisions have been reversed, while a 20%-21% reversal rate applies to the two judges who concurrently sat in the District of Utah. *Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee on S. 1130, 94th Cong., 2d Sess., 17 (1976)*. In criminal and habeas corpus matters, the reversal rate was even more disproportional. This reversal rate should also be analyzed from the standpoint of the Supreme Court's review of the decisions of the Tenth Circuit. Six of the Circuit Court's reversals of my decisions have been subsequently reviewed by the U.S. Supreme Court. This court has sustained the Tenth Circuit only once, and one case was remanded to my court.

As a further basis of comparison, in the fiscal year ending June 30, 1976, 17.9% of all cases disposed of by all of the United States Circuit Courts of Appeals, after hearing or submission, were reversed. This compares very closely with the 17.6% reversal rate of all cases disposed of by the Tenth Circuit Court of Appeals after hearing or submission. Annual Report of the Director of the Administrative Office of the United States Courts for 1976, at 277. According to the Report, there were a total of 67 reversals by the Tenth Circuit Court of Appeals, of which 17 were in civil



matters. Ten of these civil cases arose in my court. In that period, the deplorable fact is that every reported civil appeal from my court resulted in reversal in whole or in part by the Tenth Circuit Court of Appeals.

I attribute this extraordinary reversal record of cases from my court to the personal rancor towards me on the part of Judges David T. Lewis, Robert H. McWilliams and Jean S. Breitenstein. The handling of this appeal, decided by a panel including Judge McWilliams, illustrates the lengths to which the Tenth Circuit will go to embarrass me at the expense of litigants. In this case, the parties were before my court over a ten-year period. I rendered three separate opinions relating to the patent, contract, and unfair competition issues, and thereafter, damage issues. The trial, including the hearing for damages, consumed over two weeks, and was reflected by over 560 pages of transcript reporting the testimony of twelve witnesses. After considering 70 Plaintiff Exhibits (one of which alone consisted of 230 drawings), 13 Defendant Exhibits, and after hearing the testimony of these twelve witnesses, two of whom were experts in a technical field, I made 83 findings of fact and conclusions of law which were detailed and supported in each instance by the Record developed before me at trial.

Despite the fact that Rule 52 of the Federal Rules of Civil Procedure requires the Court of Appeals to accept the findings of fact of a District court unless they are clearly erroneous, I believe that some of the judges of the Tenth Circuit presume error in my findings and look for a reason to reverse. In this case, the Tenth Circuit overruled my findings based upon "evidence" principally in the form of a release document, which I had excluded from consideration upon timely objection, on the ground that the party seeking to introduce the "evidence" failed to plead the release as required by Rule 8(c), Fed. R. Civ. P. Nevertheless, the Court of Appeals, as it has many times, but most egregiously here, simply ignored the evidence that was ad-

mitted and based its reversal upon evidence which had been properly excluded and was not even a part of the record on appeal. At no point did the Court refer to the *record*, the *exhibits*, or the *witnesses* to support its version of the facts, to hold my findings "clearly erroneous" within the meaning of Rule 52. Here, as in many cases, the appellate court became a trial court de novo and simply denied the appellee the benefits of the judgment it had properly been awarded.

This well-known spectacle has made the federal court system in Utah the object of public scorn and contempt. More than 40 writs of recusal and mandamus have been filed in my court within the last year and caused me to devote an inordinate amount of judicial resources to consider these generally baseless pleadings. This is the outgrowth of tacit encouragement of this type of harassment by the Tenth Circuit. To illustrate the demeaning manner in which the Circuit Court treats my work, I can cite the very recent example of *State of Utah v. Gilmore*. In that case, I ordered a stay of execution the day before Gary Gilmore was scheduled to be executed. I believed then, as I do now, that before Gilmore was executed, a judicial determination was needed of whether the Utah Statute, under which Gilmore was sentenced, is constitutionally valid. There should have been, but never was, any appellate review of the record of the trial and sentencing. The unjudicial technique by which my decision was reviewed is described in the attached affidavit (Exhibit 1) of one of the attorneys of the American Civil Liberties Union who represented Gilmore.

My further concern is for the citizens of Utah and the accessibility of the federal court system to their needs. Litigants in Utah are reluctant to enter the federal courts because trial decisions in my court are so likely to be overturned on appeal. As there are but two judges in Utah, one half of all incoming litigants are assigned to my court. The method of judge assignment is entirely on a random basis.

The system works by lot, and chance is the only factor in the determination of assignment of judge. In every case before my court, the litigant and his attorney must consider whether their cause is best served by trying their case on the merits or against the judge. If the litigant wins at trial before me, he can literally expect the burden of having to prove his case anew on appeal, but suffering the presumption that the trial court was in error. This is a situation no litigant in the federal courts should face.

The judicial process in Utah has been further hampered by the routine, unwarranted interference of the Circuit Court in the day-to-day operations of the District Court. Chief Judge Lewis, who sits in Salt Lake City, has established a novel procedure for reviewing proceedings in my court. Thus, during the recent hearings in *U.S. v. Countryside Farms, Inc.*, Crim #75-76, Chief Judge Lewis arranged for continuous surveillance of the proceedings, even before the case was before him in an official capacity, as is evidenced by the enclosed transcript of proceedings in that case (Exhibit 2). He permitted attorneys for the Government to consult with him frequently as the hearings progressed. This procedure not only interfered with my ability to maintain order in my court, but also served to encourage the attorneys to disregard my rulings and otherwise conduct themselves in a way that showed their lack of respect for the court. The independent authority of the District Court was compromised in the process.

Both the possibility that appellees from my court are being denied their right to an impartial hearing on appeal and the breakdown of the federal judicial system in Utah are serious concerns. I respectfully urge the Court to take judicial notice of these problems in order to restore an orderly system of legal process to the State of Utah.

STATE OF UTAH  
COUNTY OF SALT LAKE

Willis W. Ritter, having been first duly sworn, deposes and says: (i) that he is the person who executed the foregoing instrument; (ii) that he has read the same and knows the contents thereof; and (iii) that the matters therein are true to his knowledge, except such matters as are stated to be upon information and belief and as to those matters, he believes them to be true.

Witness my hand this 16th day of July, 1977.

/s/

WILLIS W. RITTER, Chief Judge  
U.S. District Court, District of Utah

Subscribed and sworn to before me this 16th day of July, 1977.

/s/ SANDRA HOWARD  
Sandra Howard  
Notary Public  
[SEAL]

My commission expires: 4/4/78



## Affidavit

Judith Romney Wolbach, upon her oath deposes as follows:

1. I am an attorney at law in good standing, admitted to practice in all of the courts of the State of Utah, the United States District Court of the State of Utah, Central Division, and the United States Court of Appeals for the Tenth Circuit.

2. On January 16, 1977, I appeared with Virginius Dabney, cooperating attorney for the Utah Affiliate of the American Civil Liberties Union, before Judge Willis W. Ritter, Chief Judge of the United States District Court of the State of Utah, as counsel for the plaintiffs in *Renie Cohen, et al. vs. Scott Matheson, et al.*

3. In this action, the plaintiffs, on behalf of themselves and all taxpayers of the State of Utah, claimed, *inter alia*, that the wrongful acts of the defendants had caused and would continue to cause public funds to be unlawfully expended for the execution of Gary Mark Gilmore pursuant to an unconstitutional statute, causing them and the class they represented irreparable harm.

4. Accordingly, all other attempts to prevent the execution having proved to be futile, the plaintiffs sought injunctive relief, and after full hearing with the arguments of counsel for the plaintiffs had the arguments of counsel for the defendants, were granted a Temporary Restraining Order and Order on Hearing for Preliminary Injunction and Writ of Mandamus. Judge Ritter signed this order, after approximately one hour of deliberation in chambers, at 1:05 a.m. on January 17, 1977.

5. Shortly thereafter, Robert B. Hansen, Attorney General for the State of Utah, requested the Clerk of the Tenth Circuit Court of Appeals to convene a three-judge panel for hearing on his Motion for Stay of Judge Ritter's Order.

6. At approximately 2:30 a.m. on January 17, 1977, Mr. Hansen informed Mr. Dabney and me that the panel would be convened and that he, his deputies, and Chief Judge David T. Lewis of the Tenth Circuit Court of Appeals were flying to Denver, Colorado in a state owned and operated airplane for a hearing scheduled for approximately 6:00 a.m. that same day.

7. I agreed to appear before the Tenth Circuit Court of Appeals and to fly to Denver with Mr. Hansen, his deputies, and Judge Lewis, for the reason that no other transportation, commercial or private, was available to me at that time.

8. I arrived at the courthouse in Denver at approximately 6:20 a.m. where I was met by ACLU cooperating attorneys William F. Reynard and Rollie Rogers and ACLU regional counsel Michael Livingston and Stephen Pevar. We were able to confer only briefly and were informed by the Clerk of the Court, at approximately 6:50 a.m., that the Court had already convened.

9. When we arrived in the courtroom Chief Judge Lewis, Judge Breitenstein, and Judge McWilliams were presiding at the bench and one of the members of the Utah Attorney General's office was addressing the Court.

10. After brief statements by the movants, Stephen Pevar rose to argue that the scope of the Court's review and mandamus power was severely limited in this instance, and that it would be a patent abuse of judicial discretion for the Court to grant the mandamus request. Mr. Pevar also very ably pointed out that the determinative question was whether or not there had been gross abuse of discretion below and that it was incumbent upon the Court to give Judge Ritter a hearing to defend his Order.

11. However, Judge Breitenstein curtly, and in my opinion discourteously, interrupted Mr. Pevar's arguments,

cutting him off repeatedly and stating "As far as I'm concerned, you're wasting your time." The Court demanded that Mr. Pevar address the merits of the case, without specifying what they viewed as merits. Since Mr. Pevar, being unfamiliar with the pleadings in the case below, was unable to respond, Rollie Rogers rose and requested that I be permitted to address the Court on the merits.

12. It thereupon became necessary for me to present the taxpayers' action, in abbreviated form, as it had been argued before Judge Ritter earlier that morning. At the conclusion of my remarks, Rollie Rogers moved the Court for a stay until further review, then pending, by the United States Supreme Court.

13. This motion was denied and Judge Lewis, observing the time for the scheduled execution of Gilmore was near at hand, recessed the Court at approximately 7:30 a.m.

14. Only five minutes later, without even affording Judge Ritter the right to answer and to be heard as one of the respondents, the Tenth Circuit Court of Appeals issued its Order staying Judge Ritter's Temporary Restraining Order, and further, completely extraneous to mandamus, ordered him "to take no further action in any manner, nor of any kind involving Gary Gilmore, unless such matter is presented by a duly accredited attorney for Gilmore or by Gilmore himself."

15. Thereafter, the Clerk of the Court refused our request to use a conveniently located telephone to call Al Bronstein who was awaiting our call in the Clerk's Office at the United States Supreme Court.

DATED this 14th day of July, 1977.

/s/ JUDITH ROMNEY WOLBACH  
Judith Romney Wolbach  
Attorney at Law

State of Utah )  
: ss  
County of Salt Lake )

On 14th day of July, 1977, personally appeared before me Judith Romney Wolbach, who acknowledged to me that she signed the foregoing on the date above subscribed.

/s/ DAVID ROBINSON  
NOTARY PUBLIC  
Residing in Salt Lake County, Utah

My commission expires: 10/29/79



JULY TERM—AUGUST 10, 1976

Before Honorable Robert H. McWilliams, Circuit Judge,  
Honorable Jean S. Breitenstein, Senior Judge, and Honorable William E. Doyle, Circuit Judge.

No. 76-1331

UNITED STATES OF AMERICA, *Petitioner,*

v.

HONORABLE WILLIS W. RITTER, CHIEF JUDGE OF THE UNITED  
STATES DISTRICT COURT FOR THE DISTRICT OF UTAH,  
*Respondent.*

The United States, Petitioner, has filed its supplemental petition for writ of mandamus against the Honorable Willis W. Ritter. Upon consideration thereof, it is ORDERED that on or before one o'clock p.m., Monday, August 16, 1976, the Respondent, Willis W. Ritter, shall show cause why an order should not be entered by this Court directing him:

1. To admit to practice before the United States District Court for the District of Utah, Special Attorney William C. Hendricks, who has been appointed by the Attorney General of the United States to conduct proceedings before the Grand Jury now impaneled and sitting in the District of Utah;

2. To vacate his verbal order designated as Rule No. 4 and providing:

"No Assistant United States Attorney will be permitted to present any matter to the Grand Jury unless previously so authorized by the United States Attorney in writing. And no attorney will be permitted to practice before or present any matter to this Grand Jury unless he has previously been admitted to prac-

tice before this Court in charge of the Grand Jury for the purpose of the case in question."

3. And to allow the Grand Jury to proceed forthwith in hearing such cases as United States Attorney for the District of Utah or Special Attorney William C. Hendricks may desire to present to it.

Done at Denver, Colorado this 10th day of August, 1976.

/s/ HOWARD K. PHILLIPS  
Howard K. Phillips  
Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT  
OF UTAH  
CENTRAL DIVISION

CR-75-76

Reporter's Transcript of Hearing of Motion

UNITED STATES OF AMERICA, *Plaintiff,*

vs.

COUNTRYSIDE FARMS, INC.; EGG PRODUCERS, CO.; OLSON  
FARMS, INC.; SNOW WHITE EGG CO.; R. KENT CHRISTOFFER-  
SON; GILBERT T. COCHRAN, *Defendants.*

Salt Lake City, Utah, January 30, 1976.

BEFORE: The Honorable WILLIS W. RITTER, Chief Judge

Transcript of Proceedings

APPEARANCES:

For the United States: GARY R. SPRATLING, C. ROBERT  
DASHAROUN

For Defendant Countryside Farms, Inc., & R. Kent  
Christofferson: RICARDO FERRARI

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respect to Section 144 at this time because the affidavit  
meets the requirements of the statute. Then disqualifica-  
tion is mandatory, and we need not even proceed to Section  
455-A where the case law is not so clear about whether or  
not a hearing may be had.

THE COURT: Well, the Court rules against you on 144.

MR. SPRATLING: In that case, Your Honor, at this time  
we move for a stay of all proceedings in this case to allow  
us sufficient time to go to the Court of Appeals for the

Tenth Circuit for a writ of mandamus directing Your  
Honor to remove himself from this case.

THE COURT: Well, I will take that under advisement  
until I hear further about this matter.

MR. SPRATLING: I would like to add, Your Honor, that  
we have been advised by the Clerk of the Court approxi-  
mately 35 minutes ago that it would like to be advised of  
the fact of our ruling on the disqualification motion as soon  
as it happens.

THE COURT: I will reserve a ruling on the disqualification  
until I hear from the other side.

MR. CHRISTENSEN: Thank you, Your Honor.

MR. SPRATLING: I would like to make clear to the Court  
I have only addressed myself to 144.

THE COURT: I understand.

MR. SPRATLING: I have not proceeded to 455 yet.

THE COURT: I understand.

MR. CHRISTENSEN: Thank you, Your Honor. I should like  
to point out to the government that we are not seeking a  
factual hearing as to the truth or the falsity of the state-  
ments set forth in the affidavit. We are seeking an oppor-  
tunity to investigate the sufficiency of the affidavit and it  
has always been the law—

THE COURT: Now just a minute, I'll have no such thing  
going on now, Mr. Spratling, you carrying on a conference  
while counsel is talking to the Court.

MR. SPRATLING: I did not say a word, Your Honor.

THE COURT: Well, somebody came up from the audience  
and started to talk to you.

MR. CHRISTENSEN: We wish the opportunity to test the  
sufficiency of the affidavit and that was the purpose of re-



questing that we have the opportunity of cross examining the affiant. It is my understanding it's always been the law that when an affidavit is filed in a case that the person making the affidavit can be interrogated to determine whether or not he has actual knowledge of what the basis for the so-called allegations of fact are in the affidavit and I respectfully request the opportunity to cross

. . .

[p. 74]

egg case or anything remotely connected with it.

MR. SPRATLING: We have not alleged that, Your Honor.

THE COURT: And to impugn the honor, the integrity, the decency of one of the finest members of the Federal Bar here, Mr. Harold G. Christensen, is a dastardly piece of work.

MR. SPRATLING: That was not our purpose, Your Honor.

THE COURT: Well, whether it was your purpose or not—

MR. SPRATLING: May I say something in response?

THE COURT: I am not going to rule on this thing until I have the cases. Now there are several lines of cases on this. I have referred to some and Mr. Christensen examined the witnesses on some that I hadn't referred to. Now having reference to this affidavit and the affidavit you filed over there in the Circuit, you know how to make things confidential if you want to. There is a part of that affidavit over there in the Circuit—who is that girl that is running in and out of here. Is she your messenger girl, the one that tried to talk to you?

MR. SPRATLING: She is on the staff of the case. I don't know who just left.

THE COURT: Well, the girl in the shirtwaist, the tall one.

MR. SPRATLING: Miss Holmes.

THE COURT: I don't know what her name is. She came over here and started to talk to you. If she keeps running in and out over there—is she carrying messages somewhere for you as to what is going on?

MR. SPRATLING: She is attempting to contact the Circuit, Your Honor.

THE COURT: Well, you haven't got anything to contact the Circuit about yet and you are not about to get it until I see those cases. Now I want to be right about this and you have done a very poor job of giving me the cases. You haven't addressed yourself at all to that line of cases which say if all the judge has done is to make rulings in the case and that's all I had done before in the matter before the Grand Jury I discharged that you referred to and I am not going to say any more about it because I think the Grand Jury has been breached—the confidentiality of the Grand Jury has been breached through the activities of the United States Attorney's Office and your office.

MR. SPRATLING: I disagree with that, Your Honor.

THE COURT: Certainly by the Grand Jury . . .

## **APPENDIX E**

**[Separately Attached]**



## APPENDIX F

REVERSAL RATES: 1966-1976  
FOR ALL CIRCUIT COURTS OF APPEAL AND FOR 10TH CIRCUIT

## FISCAL YEAR 1976

Circuit and Nature of Proceeding	Total*	Affirmed or Granted	Dismissed	Reversed or Denied	Other	Percent Reversed or Denied
ALL CIRCUITS .....	9,351	6,995	406	1,680	270	17.9
Criminal .....	3,114	2,689	51	334	40	10.7
U.S. Civil .....	1,474	1,028	65	330	51	22.4
Private Civil .....	3,746	2,621	215	813	97	21.7
Bankruptcy .....	135	80	14	33	8	24.4
Administrative Appeals ..	874	573	60	167	74	19.1
Original Proceedings ....	8	4	1	3	—	—
TENTH CIRCUIT .....	382	279	23	67	13	17.6
Criminal .....	137	120	3	13	1	9.5
U.S. Civil .....	59	38	2	17	2	28.8
Private Civil .....	149	95	13	32	9	21.5
Bankruptcy .....	13	7	3	3	—	—
Administrative Appeals ..	23	19	1	2	1	—
Original Proceedings ....	1	—	1	—	—	—

## FISCAL YEAR 1975

ALL CIRCUITS .....	9,077	6,763	418	1,632	264	17.8
Criminal .....	2,938	2,450	69	318	71	11.8
U.S. Civil .....	1,639	1,144	74	366	55	22.3
Private Civil .....	3,609	2,567	218	718	106	19.9
Bankruptcy .....	176	118	14	35	9	19.9
Administrative Appeals ..	679	474	37	146	22	21.5
D.C. Court of Appeals ...	—	—	—	—	—	—
Original Proceedings ....	36	10	6	19	1	—
TENTH CIRCUIT .....	406	292	24	82	8	19.5
Criminal .....	112	102	2	6	2	5.4
U.S. Civil .....	76	51	1	24	—	31.6
Private Civil .....	163	107	10	41	5	25.2
Bankruptcy .....	15	9	3	2	1	—
Administrative Appeals ..	33	22	6	5	—	15.2
Original Proceedings ....	7	1	2	4	—	—

\* Cases disposed of after hearing or submissions.

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**REVERSAL RATES: 1966-1976**  
**FOR ALL CIRCUIT COURTS OF APPEAL AND FOR 10TH CIRCUIT**

## FISCAL YEAR 1974

Circuit and Nature of Proceeding	Total*	Affirmed or Granted	Dismissed	Reversed or Denied	Other	Percent Reversed or Denied
ALL CIRCUITS .....	8,451	6,429	263	1,579	180	18.6
Criminal .....	2,911	2,463	33	385	30	13.2
U.S. Civil .....	1,420	1,025	51	288	56	20.3
Private Civil .....	3,266	2,330	140	724	72	22.2
Bankruptcy .....	181	138	8	31	4	17.1
Administrative Appeals ..	645	466	27	136	16	21.1
D.C. Court of Appeals ...	—	—	—	—	—	—
Original Proceedings ....	28	7	4	15	2	—
TENTH CIRCUIT .....	438	324	13	91	10	19.9
Criminal .....	141	115	3	21	2	14.0
U.S. Civil .....	72	56	2	12	2	16.7
Private Civil .....	169	115	3	46	5	27.2
Bankruptcy .....	20	13	2	4	1	—
Administrative Appeals ..	31	25	3	3	—	6.7
Original Proceedings ....	5	—	—	5	—	—

## FISCAL YEAR 1973

ALL CIRCUITS .....	9,618	7,163	540	1,693	222	17.5
Criminal .....	2,995	2,483	86	374	52	12.5
U.S. Civil .....	1,699	1,190	110	362	37	21.3
Private Civil .....	3,987	2,820	284	782	101	19.6
Bankruptcy .....	188	120	14	47	7	25.0
Administrative Appeals ..	725	546	39	115	25	15.9
D.C. Court of Appeals ...	1	—	—	1	—	—
Original Proceedings ....	23	4	7	12	—	—
TENTH CIRCUIT .....	736	555	64	107	10	14.6
Criminal .....	166	133	13	17	3	10.2
U.S. Civil .....	175	135	8	31	1	17.7
Private Civil .....	333	250	27	50	6	15.0
Bankruptcy .....	19	13	4	2	—	—
Administrative Appeals ..	41	24	10	7	—	17.1
Original Proceedings ....	2	—	2	—	—	—

\* Cases disposed of after hearing or submissions.

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**REVERSAL RATES: 1966-1976**  
**FOR ALL CIRCUIT COURTS OF APPEAL AND FOR 10TH CIRCUIT**

## FISCAL YEAR 1972

Circuit and Nature of Proceeding	Total*	Affirmed or Granted	Dismissed	Reversed or Denied	Other	Percent Reversed or Denied
ALL CIRCUITS .....	8,537	6,207	549	1,664	117	19.4
Criminal .....	2,664	2,209	70	356	29	13.4
U.S. Civil .....	1,526	1,071	104	333	18	21.8
Private Civil .....	3,422	2,285	297	799	41	23.3
Bankruptcy .....	188	122	15	47	4	25.0
Administrative Appeals ..	701	507	56	113	25	16.1
D.C. Court of Appeals ...	15	8	—	7	—	—
Original Proceedings ....	21	5	7	9	—	—
TENTH CIRCUIT .....	657	504	58	91	4	13.8
Criminal .....	180	142	13	23	2	12.8
U.S. Civil .....	177	147	13	16	1	9.0
Private Civil .....	253	188	21	43	1	17.0
Bankruptcy .....	11	4	5	2	—	—
Administrative Appeals ..	31	23	2	6	—	19.4
Original Proceedings ....	5	—	4	1	—	—

## FISCAL YEAR 1971

ALL CIRCUITS .....	7,606	5,765	375	1,377	89	18.1
Criminal .....	2,200	1,853	51	277	19	12.6
U.S. Civil .....	1,416	1,015	86	302	13	21.3
Private Civil .....	3,137	2,266	180	650	41	20.7
Bankruptcy .....	100	78	6	15	1	15.0
Administrative Appeals ..	708	528	43	123	14	17.4
D.C. Court of Appeals ...	11	5	2	4	—	—
Original Proceedings ....	34	20	7	6	1	—
TENTH CIRCUIT .....	559	464	32	58	5	10.5
Criminal .....	115	102	3	10	—	8.7
U.S. Civil .....	151	126	8	15	2	9.9
Private Civil .....	252	204	17	29	2	11.5
Bankruptcy .....	6	4	2	—	—	—
Administrative Appeals ..	29	25	—	4	—	13.8
Original Proceedings ....	6	3	2	—	1	—

\* Cases disposed of after hearing or submissions.



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REVERSAL RATES: 1966-1976  
FOR ALL CIRCUIT COURTS OF APPEAL AND FOR 10TH CIRCUIT

## FISCAL YEAR 1970

Circuit and Nature of Proceeding	Total*	Affirmed or Granted	Dismissed	Reversed or Denied	Other	Percent Reversed or Denied
ALL CIRCUITS .....	6,139	4,626	120	1,280	113	20.9
Criminal .....	1,776	1,441	11	295	29	16.6
U.S. Civil .....	1,037	750	26	239	22	23.0
Private Civil .....	2,502	1,793	60	606	43	24.2
Bankruptcy .....	116	86	5	25	—	21.6
Administrative Appeals ..	664	527	16	103	18	15.5
D.C. Court of Appeals ...	7	—	—	6	1	—
Original Proceedings ....	37	29	2	6	—	—
TENTH CIRCUIT .....	444	360	6	71	7	16.0
Criminal .....	81	57	1	21	2	25.9
U.S. Civil .....	128	117	—	10	1	7.8
Private Civil .....	209	163	5	37	4	17.7
Bankruptcy .....	5	4	—	1	—	—
Administrative Appeals ..	19	18	—	1	—	—
Original Proceedings ....	2	1	—	1	—	—

## FISCAL YEAR 1969

ALL CIRCUITS .....	5,121	3,838	118	1,072	93	20.9
Criminal .....	1,375	1,155	13	188	19	13.7
U.S. Civil .....	895	638	26	211	20	23.6
Private Civil .....	2,076	1,473	64	489	40	24.0
Bankruptcy .....	118	82	2	33	1	28.0
Administrative Appeals ..	619	466	10	130	13	21.0
D.C. Court of Appeals ...	8	3	1	4	—	—
Original Proceedings ....	30	21	2	7	—	23.3
TENTH CIRCUIT .....	395	317	8	62	8	15.7
Criminal .....	90	81	—	9	—	10.0
U.S. Civil .....	104	84	2	17	1	16.3
Private Civil .....	164	127	6	25	6	15.2
Bankruptcy .....	6	5	—	1	—	—
Administrative Appeals ..	30	19	—	10	1	33.3
Original Proceedings ....	1	1	—	—	—	—

\* Cases disposed of after hearing or submissions.

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REVERSAL RATES: 1966-1976  
FOR ALL CIRCUIT COURTS OF APPEAL AND FOR 10TH CIRCUIT

## FISCAL YEAR 1968

Circuit and Nature of Proceeding	Total*	Affirmed or Granted	Dismissed	Reversed or Denied	Other	Percent Reversed or Denied
ALL CIRCUITS .....	4,668	3,499	107	1,009	53	21.6
Criminal .....	1,150	944	6	184	16	16.0
U.S. Civil .....	771	547	25	102	7	24.9
Private Civil .....	2,023	1,475	44	486	18	24.0
Bankruptcy .....	121	81	4	36	—	29.8
Administrative Appeals ..	557	424	24	99	10	17.8
D.C. Court of Appeals ...	14	5	1	6	2	—
Original Proceedings ....	32	23	3	6	—	—
TENTH CIRCUIT .....	470	389	11	68	2	14.5
Criminal .....	83	71	—	12	—	14.5
U.S. Civil .....	95	73	5	17	—	17.9
Private Civil .....	269	224	6	37	2	13.8
Bankruptcy .....	5	4	—	1	—	—
Administrative Appeals ..	17	17	—	—	—	—
Original Proceedings ....	1	—	—	1	—	—

## FISCAL YEAR 1967

ALL CIRCUITS .....	4,468	3,340	114	954	60	21.5
Criminal .....	984	838	6	133	7	13.5
U.S. Civil .....	822	580	25	203	14	24.7
Private Civil .....	1,927	1,376	57	472	22	24.5
Bankruptcy .....	137	100	7	29	1	21.2
Administrative Appeals ..	523	386	16	107	14	20.5
D.C. Court of Appeals ...	8	3	—	3	2	—
Original Proceedings ....	67	57	3	7	—	—
TENTH CIRCUIT .....	393	303	17	55	18	14.0
Criminal .....	70	59	—	10	1	14.3
U.S. Civil .....	98	74	6	16	2	16.3
Private Civil .....	183	443	9	22	9	12.0
Bankruptcy .....	5	3	—	2	—	—
Administrative Appeals ..	33	21	2	4	6	12.1
Original Proceedings ....	4	3	—	1	—	—

\* Cases disposed of after hearing or submissions.

**REVERSAL RATES: 1966-1976**  
**FOR ALL CIRCUIT COURTS OF APPEAL AND FOR 10TH CIRCUIT**

**FISCAL YEAR 1966**

Circuit and Nature of Proceeding	Total*	Affirmed or Granted	Dismissed	Reversed or Denied	Other	Percent Reversed or Denied
ALL CIRCUITS .....	4,087	3,026	128	866	67	21.7
Criminal .....	801	649	20	115	17	14.4
U.S. Civil .....	784	572	24	175	13	22.3
Private Civil .....	1,690	1,193	57	418	22	24.7
Bankruptcy .....	116	85	7	23	1	19.8
Administrative Appeals ..	563	414	13	125	11	22.2
D.C. Court of Appeals ...	10	2	1	4	3	—
Original Proceedings .....	123	111	6	6	—	—
TENTH CIRCUIT .....	359	267	8	77	7	20.9
Criminal .....	44	33	—	11	—	25.0
U.S. Civil .....	84	69	3	9	3	10.7
Private Civil .....	208	154	1	49	4	23.6
Bankruptcy .....	—	—	—	—	—	—
Administrative Appeals ..	18	9	4	5	—	—
Original Proceedings .....	5	2	—	3	—	—

\* Cases disposed of after hearing or submissions.